United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7021

B

P/S

In The

United States Court of Appeals

For The Second Circuit

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff-Appellee,

vs.

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant-Appellant.

On Appeal From the United States District Court for the Eastern District

JOINT APPENDIX

Volume I, pp. 1a - 262a

MILBANK TWEED HADLEY & McCLOY
Attorneys for Defendant-Appellant
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New York, New York 10005
(212) 422-2660

ROGERS & WELLS
Attorneys for Plaintiff-Appellee
200 Park Avenue
New York, New York 10017
(212) 972-7000

UNITED STATES COURT OF APPEALS
FILED
MAR 15 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

(9340)

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19483

74C 0623 DOCKET

FILED U.S.D.C.

RUCHHAUSEN, J. 2-11-74

TITLE OF CASE

FREDERIC P. WIEDERSUM ASSOCIATES

- against -

NATIONAL HOMES CONSTRUCTION CORPORATION

ATTORNEYS

For Plaintiff: ROGERS & WELLS
200 Park Avenue
New York, N.Y. 10017

For Defendant: MILBANK, TWEED
HADLEY & McCLOY
1 Chase Manhattan Plaza
New York, N.Y. 10005
422-2660

BASIS OF ACTION: Breach of agreement

Seeks: $1,250,000.00

JURY TRIAL CLAIMED

IN DEMAND

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBURSED	
						1-31-74	Petition for Removal	15	00		
						2-3-74	Paid to Clerk			15	-
						2-4-74	Copies	5	-		
						2-11-74	Paid to Tilly			5	-

ABSTRACT OF COSTS

TO WHOM DUE	AMOUNT

RECEIPTS, REMARKS, ETC.

DATE	PROCEEDINGS	AMOUNT REPORTED / EMOLUMEN RETURN
5-31-74	Petition for removal filed. (Sup. Ct/ Nassau)	1
5-31-74	Bond for removal filed.	2
6-5-74	Notice of removal filed.	3
6/10/74	ANSWER of deft filed.	4
6/10/74	Notice of depositions filed (to take the deposition of pltff)	5
6/10/74	Deft's Notice to Produce filed.	6
6-19-74	Pltff's demand for jury trial filed.	7
8/16/74	Notice to Produce filed.	8
11-22-74	Notice to take depositions of Floyd Payne, James Woolery, Orville Duley filed.	9
12-6-74	Notice of motion and memorandum of law for a protective order ret 12-12-74 at 10 A.M. filed.	10/11
12-12-74	Affidavit of Andrew D. Stone in opposition to deft's motion for a protective order filed.	12
12-12-74	Before BRUCHHAUSEN, J.-Case called and withdrawn.	13
4-14-75	Interrogatories filed.	14
5/15/75	Answers to Interrogatories filed.	15
11/7/75	Notice of Motion , ret. 11/10/75 filed re: for summary judgment	
11/7/75	Memorandum in Support of Pltff's Motion for Summary Judgment filed.	16
11-19-75	Before BRUCHHAUSEN,J.-Defts motion granting summary judgment in favor of deft argued. Decision reserved.	17
11-20-75	Affidavit of William G. Laverty filed. (mg)	
11/21/75	By BRUCHHAUSEN,J.- Memorandum and Order dtd 11/21/75 filed that the deft's motion for summary judgment is denied. Copies sent to the parties.	18
11-24-75	Reply affidavit of Arvil Duley filed.	19
12/8/75	Before BRUCHHAUSEN,J.- Case called- Jury of 6 impanelled- Trial commenced-Cont'd to 12/9/75	
12-9-75	Before BRUCHHAUSEN,J.-Trial resumed. Cont'd to 12-10-75.	
12/10/75	Before BRUCHHAUSEN,J.- Case called- Trial resumed and cont'd to 12/11/75	
12/11/75	Before BRUCHHAUSEN,J.- Case called- Trial resumed and cont'd to 12/11/75	
12-12-75	By BRUCHHAUSEN, J. - Order dtd 12-12-75 of sustenance filed.	20
12-12-75	Before BRUCHHAUSEN, J.--Case called. Attys present. Trial resumed. --Attys summed up to jury. Jury deliberates.	

CONTINUED

DATE	PROCEEDINGS
	Verdict of $150,000. for pltff. Deft moved for judgment in spited of verdict. Motion denied. Deft moved for a reduction of verdict as excessive. Motion denidd.
12-12-75	JUDGMENT ON JURY VERDICT FILED. Ordered that the pltff recover deft the sum of $150,000 together with interest, costs and disbursements of this action. (21)
1-8-76	Bill of Costs filed. (mg) (22)
1-9-76	Stenographer's transcripts of 12-8-75 to 12-12-75 filed. (23+27)
1-9-76	Notice of appeal filed. Duplicate mailed to pltff & C of A. (28)
1-9-76	Bond undertaking on appeal filed. (29)
2-13-76	Pltff's memorandum in opposition to deft's motion for summary judgment filed. (30)
2-13-76	Pltff's evidence in opposition to deft's motion for summary judgment filed. (31)
2-13-76	Deft's statement pursuant to Local Rule 9(g) filed. (32)
2-13-76	Trial memorandum of deft filed. (33)
2-13-76	Reply memorandum in support of deft's motion for summary judgment filed. (34)
2-13-76	Deposition transcript of FLOYD J. PAYNE filed (35)
2-13-76	Deposition transcript of JAMES C. WOOLERY filed (36)
2-13-76	Deposition transcript of ARVIL PILEY filed. (37)
2-13-76	Depositon transcrilpt of ALBERT H. VOORHEFELD filed. (38)
2-13-76	Deposition transcript of FREDERIC G. WIEDERSUM filed. (39)
2-13-76	Deposition transcript of NORMAN J. WIEDERSUM filed. (40)
2-13-76	Deposition transcript of WILLIAM C. LAVERTY filed. (41)
2-17-76	Copy of pltff's request for charge no. 1 filed. (42)
2-17-76	Copy of Deft's request for jury instructions filed (43)

A TRUE COPY
ATTEST
DATED Feb. 11 19 76
LEWIS ORGEL CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74C 823

- -x

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against- 74 Civ.

NATIONAL HOMES CONSTRUCTION CORPORATION, PETITION FOR REMOVAL

Defendant.

- -x

To the United States District Court for the Eastern District of New York:

The petition of National Homes Construction Corporation respectfully shows:

1. An action was commenced against petitioner in the Supreme Court of the State of New York, County of Nassau, entitled "Frederic P. Wiedersum Associates, Plaintiff, against National Homes Construction Corporation, Defendant," by service of a summons and verified complaint on defendant on May 2, 1974. Copies of the summons and verified complaint are annexed hereto as Exhibit A.

2. This is an action for recovery of $250,000 based upon alleged breach of contract, false representations and negligence in failing to submit a bid for a contract to construct housing units.

3. The verified complaint alleges and, upon information and belief, at all times since the commencement of this action plaintiff was and now is a partnership with its principal place of business in the State of New York and is a citizen of the State of New York, with no partner thereof being a citizen of the State of Indiana.

4. At all times since the commencement of this action, as alleged in the verified complaint, petitioner was and now is a corporation organized under the laws of the State of Indiana with its principal place of business in the State of Indiana and is a citizen of the State of Indiana and not a citizen of the State of New York.

5. The matter in controversy exceeds the sum of $10,000, exclusive of interest and costs.

6. Jurisdiction of this Court is founded on diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332.

7. This petition is accompanied by a bond conditioned as required by law.

WHEREFORE, petitioner prays that this action be removed to this Court.

Dated: New York, N.Y.
May 30, 1974

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)

1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Petitioner

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RUSSELL E. BROOKS, being duly sworn, says:

I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant. I have read the foregoing petition and it is true to my own knowledge, except as to matters therein stated upon information and belief and as to those matters I believe it to be true. The grounds of my information and belief as to all matters not stated upon my own knowledge are the verified complaint herein, and correspondence and other writings furnished to me by defendant. The reason this verification is not made by defendant is that defendant is a foreign corporation.

Russell E. Brooks

Sworn to before me this
31st day of May, 1974.

LOUIS A. WOLF
NOTARY PUBLIC, State of New York
No. 30-9723500
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1976

C 104 Summons without Notice, Blank Court. 8-71
Personal Service.

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80 EXCHANGE PLACE AT BROADWAY, NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff

against

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant

Index No.

Plaintiff designates Nassau *County as the place of trial*

The basis of the venue is plaintiff's residence

Summons

Plaintiff resides at 65 Roosevelt Avenue, Valley Stream, New York,

County of Nassau

To the above named Defendant

You are hereby summoned *to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within* 20 *days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.*

Dated, April 30, 1974.

Rogers & Wells
Attorney(s) for Plaintiff

Office and Post Office Address
200 Park Avenue
New York, N.Y. 10017
(212) 972-7000

ANDY SICHEL
TCM TOWELL

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

FREDERIC P. WIEDERSUM ASSOCIATES, Plaintiff, -against- NATIONAL HOMES CONSTRUCTION CORPORATION, Defendant.	VERIFIED COMPLAINT

Plaintiff, by its attorneys, Rogers & Wells, for its complaint against the defendant, respectfully states:

FIRST CAUSE OF ACTION

1. At all times hereinafter mentioned, plaintiff Frederic P. Wiedersum Associates ("Wiedersum") was and is a partnership with its principal place of business at 65 Roosevelt Avenue, Valley Stream, New York.

2. At all times pertinent herein, Wiedersum has been engaged primarily in the business of providing architectural and engineering services, including the design and engineering of quality housing units.

3. Upon information and belief, defendant National Homes Construction Corporation ("National") is and was at all times pertinent herein a corporation organized and existing under the laws of the State of Indiana with its main office in Lafayette, Indiana, and which has offices and does business in the State of New York. Defendant, among other things, is in the construction business, including the construction of quality housing units.

BEST COPY AVAILABLE

4. On March 29, 1971, Wiedersum and National 9a entered into a written agreement pursuant to which National engaged Wiedersum to design quality low-rise student housing acceptable for purchase by the New Jersey Educational Facilities Authority, said housing to be constructed by National to the designs of Wiedersum in the event a construction contract was awarded by the New Jersey Educational Facilities Authority to National after competitive bidding. Pursuant to said agreement, on each project the parties agreed to work on National was obligated to submit a bid to the New Jersey Educational Facilities Authority computed in accordance with the agreement, said bid to include Wiedersum's fee, National's fee, and direct construction expense and estimated job overhead costs as determined by National. Said agreement further provided that the parties would indemnify each other against any damages, losses or liabilities arising out of their own acts or negligence in the performance of the agreement.

5. In January 1973, National and Wiedersum agreed that they would work together to submit a proposal and bid on a 200 family housing unit project at the Naval Weapons Station, Charleston, South Carolina, to be constructed for the Department of the Navy (hereinafter referred to as the "South Carolina Project"). It was agreed that the terms and procedures set forth in the agreement described in paragraph 4 would be followed in bidding on the South Carolina project, with Wiedersum to prepare the plans and specifications for National, and National to calculate and submit a bid on the South Carolina Project to the Department of the Navy, and to construct said Project in the event National's bid was accepted.

6. Thereafter Wiedersum expended great time, labor and effort in preparing plans and specifications for the South Carolina Project. Numerous meetings and conversations took place between the parties to prepare the plans and specifications and in order that National would have all the information necessary to calculate a successful bid. In addition, Wiedersum advised National that in the event National was the successful bidder on the South Carolina Project Wiedersum's fee would be $250,000. This information was necessary in order for National to calculate the bid.

7. On or about April 4, 1973, Wiedersum sent to National the final plans and specifications for the South Carolina Project, and Wiedersum was advised by National that the bid would be submitted to the Department of the Navy.

8. Contrary to the representations made by National and in breach of the agreement between the parties, National failed to submit a bid on the South Carolina Project and the parties were thus precluded from consideration by the Department of the Navy for said Project.

9. By reason of the foregoing, plaintiff has been damaged in the amount of $250,000.

SECOND CAUSE OF ACTION

10. Wiedersum repeats and realleges the allegations set forth in paragraphs 1 through 8 as if set forth at length herein.

11. Wiedersum expended time, labor and expense in preparing plans and specifications for the South Carolina Project at the specific request of National and based upon National's representation that it would submit a bid on the South Carolina Project.

12. National failed to submit a bid on the South Carolina Project as had been represented to Wiedersum and, accordingly, Wiedersum is entitled to recover the reasonable value of its time, labor and expenses in the amount of $250,000.

THIRD CAUSE OF ACTION

13. Wiedersum repeats and realleges the allegations set forth in paragraphs 1 through 8 as if set forth at length herein.

14. Upon information and belief, National made material misrepresentations of fact to Wiedersum in order to induce Wiedersum to provide architectural and engineering services to National without just compensation. National misrepresented that it was going to submit a bid on the South Carolina Project at a time when it knew or should have known that said representation was not true.

15. Wiedersum expended time, labor and expense on National's behalf in reliance upon the representations made by National, and would not have expended time, labor and expense but for said representations. Accordingly, Wiedersum is entitled to recover the reasonable value of its services in the amount of $250,000.

FOURTH CAUSE OF ACTION

16. Wiedersum repeats and realleges the allegations set forth in paragraphs 1 through 8 as if set forth at length herein.

17. National was careless and negligent in failing to submit a bid on the South Carolina Project, which negligence and carelessness caused Wiedersum damage and loss in the amount of $250,000.

FIFTH CAUSE OF ACTION

18. Wiedersum repeats and realleges the allegations set forth in paragraphs 1 through 8 as if set forth at length herein.

19. Upon information and belief, had National submitted a bid and proposal to the Department of the Navy on the South Carolina Project based upon the plans and specifications prepared by Wiedersum, National would have been the successful bidder and Wiedersum would have received its fee in the amount of $250,000.

20. By reason of the foregoing, National's failure to submit the bid on the South Carolina Project has damaged Wiedersum in the amount of $250,000.

WHEREFORE, plaintiff Frederic P. Wiedersum Associates demands judgment against defendant National Homes Construction Corporation on the first cause of action in the amount of $250,000; on the second cause of action in the amount of $250,000; on the third cause of action in the amount of $250,000; on the fourth cause of action in amount of $250,000; and on the fifth cause of action in the amount of $250,000; together with the costs and disbursements of this action.

ROGERS & WELLS

Attorneys for Plaintiff
Office & P.O. Address
200 Park Avenue
New York, New York 10017

V E R I F I C A T I O N

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

FREDERIC G. WIEDERSUM, being duly sworn, deposes and says: I am a partner in the partnership of Frederic P. Wiedersum Associates the plaintiff herein. I have read the foregoing complaint and know the contents thereof to be true except as to matters stated on information and belief, and as to those matter I believe it to be true.

Frederic G. Wiedersum

Sworn to before me this
29th day of April 1974.

Notary Public

ALLEN E. FENNELL
NOTARY PUBLIC, State of New York
No 30-1193525
Qualified in Nassau County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

C.D. 1 14a

- -x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff,

-against- : 74 Civ. 823

NATIONAL HOMES CONSTRUCTION CORPORATION, ANSWER

:

Defendant.

- -x

Defendant, by its attorneys, Milbank, Tweed, Hadley & McCloy, for its answer to the complaint:

1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraphs 1 and 2, except admits, on information and belief, that plaintiff is and was at all times relevant hereto a partnership with its principal place of business in New York State and primarily engaged in the business of providing architectural and engineering services.

2. Denies each and every allegation contained in Paragraph 3 except admits that defendant is and was at all times relevant hereto a corporation organized and existing under the laws of the State of Indiana with its main office in Lafayette, Indiana and engaged in the construction business, including the construction of housing facilities.

3. Denies each and every allegation contained in Paragraph 4 except admits that on or about March 29, 1971 plaintiff and defendant entered into a written agreement relating to construction of student housing facilities and begs leave to refer thereto for an accurate and complete statement of its contents.

4. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 5 except admits that in early 1973 plaintiff and defendant worked together on a proposal relating to construction of 200 family housing units at the Naval Weapons Station, Charleston, South Carolina to be constructed for the Department of the Navy (the "South Carolina Project").

5. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 6 except admits that numerous meetings and conversations took place between plaintiff and defendant in connection with the proposal for the South Carolina Project and that plaintiff advised defendant that plaintiff's fee would be $250,000, in the event that a contract for the South Carolina Project was awarded to defendant.

6. Denies each and every allegation contained in Paragraph 7 except admits that on or about April 4, 1973 plaintiff sent to defendant plans and specifications for the South Carolina Project.

7. Denies each and every allegation contained in Paragraphs 8 and 9 except admits that defendant did not submit a bid.

8. Denies each and every allegation contained in Paragraph 11, except denies knowledge or information sufficient to form a belief as to the truth of the allegations relating to the time, labor and expense expended by plaintiff.

9. Denies each and every allegation contained in Paragraph 12 except admits that defendant did not submit a bid.

10. Denies each and every allegation contained in Paragraphs 14 and 15 except denies knowledge or information sufficient to form a belief as to the allegations relating to the time, labor and expense expended by plaintiff.

11. Denies each and every allegation contained in Paragraph 17.

12. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 19.

13. Denies each and every allegation contained in Paragraph 20.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE, DEFENDANT ALLEGES:

14. Plaintiff's claims are barred by the Statute of Frauds.

WHEREFORE, defendant demands judgment dismissing the complaint, together with costs and disbursements of this action.

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A member of the firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, :

-against- :

NATIONAL HOMES CONSTRUCTION CORPORATION, : AFFIDAVIT OF SERVICE

Defendant : 74 Civ. 823

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEVEN L. KROLESKI, being duly sworn, deposes and says:

I am over the age of 21 years and am not a party to this action.

On the 7th day of June, 1974, I served the within Answer on Rogers & Wells by depositing a true copy thereof, securely enclosed in a post-paid wrapper, addressed to them at 200 Park Avenue, New York, N.Y., in a mailbox maintained by the Government of the United States at 1 Chase Manhattan Plaza, New York, N.Y.

Steven L. Kroleski

Sworn to before me this
10th day of June, 1974.

Alan Bischoff

ALAN BISCHOFF
NOTARY PUBLIC, State of New York
No. 24-0299258
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

DEFENDANT'S NOTICE TO PRODUCE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against-

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant.

74 Civ. 823

NOTICE TO PRODUCE

- -x

S I R S :

PLEASE TAKE NOTICE that defendant hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that plaintiff produce for inspection and copying on July 15, 1974 at 10 A.M. at the office of the undersigned, 1 Chase Manhattan Plaza, New York, N.Y. the following: (1) all communications between plaintiff and defendant and (2) all books, records, correspondence, agreements, proposals, memoranda, notes, reports, analyses, summaries, diaries, sketches and drawings, work papers, bills, invoices, time records, documents and other papers relating to (a) the construction of dormitory facilities for the New Jersey Educational Facilities Authority, (b) the construction of housing facilities at the Naval Complex Warminister/Willow Grove, Pennsylvania, and (c) the construction of housing facilities at the Naval Weapons Station, Charleston, South Carolina.

Dated: New York, N.Y.
June 7, 1974

Yours, etc.,

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A member of the firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant

TO: ROGERS & WELLS
200 Park Avenue
New York, N.Y. 10017
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, :

-against- :

NATIONAL HOMES CONSTRUCTION CORPORATION, : AFFIDAVIT OF SERVICE

Defendant : 74 Civ. 823

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEVEN L. KROLESKI, being duly sworn, deposes and says:

I am over the age of 21 years and am not a party to this action.

On the 7th day of June, 1974, I served the within Notice to Produce on Rogers & Wells by depositing a true copy thereof, securely enclosed in a post-paid wrapper, addressed to them at 200 Park Avenue, New York, N.Y., in a mailbox maintained by the Government of the United States at 1 Chase Manhattan Plaza, New York, N.Y.

Steven L. Kroleski

Sworn to before me this
10th day of June, 1974.

Alan Bischoff

ALAN BISCHOFF
NOTARY PUBLIC, State of New York
No. 24-0390258
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

PLAINTIFF'S NOTICE TO PRODUCE 20a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, :

-against- :

NATIONAL HOMES CONSTRUCTION CORPORATION, :

Defendant. :

- x

74 Civ. 823

NOTICE TO PRODUCE (FJL)

S I R S :

PLEASE TAKE NOTICE that plaintiff hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that plaintiff produce for inspection and copying on September 19, 1974 at 10 A.M. at the office of the undersigned, 200 Park Avenue, New York, N.Y., the following: (1) all communications between defendant and plaintiff, and (2) all books, records, correspondence, agreements, proposals, memoranda, notes, reports, analyses, summaries, diaries, sketches and drawings, work papers, bills, invoices, time records, documents, bids and other papers relating to (a) the construction of dormitory facilities for the New Jersey Educational Facilities Authority, (b) the construction of housing facilities at the Naval Complex Warminister/Willow Grove, Pennsylvania, (c) the construction of housing facilities at the Naval Weapons Station, Charleston, South Carolina, and (d) any other proposed construction projects from March 1971 to March 1974.

Dated: New York, N.Y.
August 15, 1974

Yours, etc.,

ROGERS & WELLS

By _____
(A member of the firm)
200 Park Avenue
New York, N.Y. 10017
Attorneys for Plaintiff

TO: Milbank, Tweed,
Hadley & McCloy
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant

4-15-14

21a

PLAINTIFF'S INTERROGATORIES

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FREDERIC P. WIEDERSUM ASSOCIATES, Plaintiff, -against- NATIONAL HOMES CONSTRUCTION CORPORATION, Defendant.	INTERROGATORIES 74 Civ. 823

Plaintiff hereby propounds the following interrogatories to defendant pursuant to Rule 33 of the Federal Rules of Civil Procedure, to be answered under oath and in writing within thirty days from the date of service of a copy hereof upon the attorneys for defendant:

1. With respect to the termination of Mr. John Gleason's employment with defendant National Homes Construction Corp.:

(a) State the date on which said termination occurred;

(b) State the reasons for said termination; and

(c) Attach to your answers any documents relating to said termination.

2. With respect to the letter dated March 30, 1973 from Mr. Laverty to Mr. Arvil Duley, identify all documents, attachments and enclosures which were received by defendant with said letter and attach copies of all such documents to your answers.

3. State whether a deliberate decision was made by defendant, its officers or its employees not to submit a bid

on the Charleston project which is the subject of this litigation.

4. If the answer to Interrogatory 3 is in the affirmative:

(a) State the date on which such a decision was made;

(b) Identify all persons who were involved in such a decision; and

(c) State the reasons for defendant's decision not to submit a bid on the Charleston project.

5. If the answer to Interrogatory 3 is in the negative, state the reasons why no such bid was submitted by defendant and identify all persons having knowledge of such reasons.

Dated: New York, New York
April 10, 1975

ROGERS & WELLS
Attorneys for Plaintiff
200 Park Avenue
New York, New York 10017

By _____
A Member of the Firm

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against-

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant.

- -x

ANSWERS TO INTERROGATORIES

74 Civ. 823

Defendant for its answers to plaintiff's interrogatories dated April 10, 1975, states as follows:

Interrogatory No. 1. With respect to the termination of Mr. John Gleason's employment with defendant National Homes Construction Corp.:

(a) State the date on which said termination occurred;

(b) State the reason for said termination; and

(c) Attach to your answers any documents relating to said termination.

Answer. (a) August 19, 1973.

(b) Problems relating to a project at the Offutt Air Force Base, Omaha, Nebraska.

(c) None.

Interrogatory No. 2. With respect to the letter dated March 30, 1973 from Mr. Laverty to Mr. Arvil Duley, identify all documents, attachments and enclosures which were received by defendant with said letter and attach copies of all such documents to your answers.

Answer. Packet of documents consisting of:

(a) White sheet indicating identification number 0-129.

(b) Mailing label.

(c) Pink sheet indicating bid bond or certified check must accompany bid.

(d) General Services Administration - Standard Form 20 - Request for Proposals (Construction Contract).

(e) General Services Administration - Standard Form 21 (modified) - Proposal Form (Construction Contract) - 7 copies.

(f) General Services Administration - Standard Form 19B - Representations and Certifications (Construction Contract) - 7 copies.

(g) General Services Administration - Standard Form 19A - Labor Standards Provisions.

(h) Attachment to Standard Form 19A.

(i) General Services Administration - Standard Form 23 (Construction Contract).

(j) General Services Administration - Standard Form 23A - General Provisions (Construction Contract).

(k) Additional General Provisions (Construction Contract).

Copies of the above documents will be made available for inspection at the offices of defendant's attorneys at a time to be mutually agreed upon with plaintiff's attorneys.

Interrogatory No. 3. State whether a deliberate decision was made by defendant, its officers or its employees not to submit a bid on the Charleston project which is the subject of this litigation.

Answer. Yes.

Interrogatory No. 4. If the answer to Interrogatory 3 is in the affirmative:

(a) State the date on which such a decision was made;

(b) Identify all persons who were involved in such a decision; and

(c) State the reasons for defendant's decision not to submit a bid on the Charleston project.

Answer. (a) On or about April 2, 1973.

(b) The decision was made by John Gleason.

(c) The reasons for the decision not to submit a bid for the Charleston project were the failure of plaintiff to submit plans on time, problems with the soil conditions at the project location and the inability to get bids from subcontractors for necessary land improvement work.

Interrogatory No. 5. If the answer to Interrogatory 3 is in the negative, state the reasons why no such bid was submitted by defendant and identify all persons having knowledge of such reasons.

Answer. Not applicable.

NATIONAL HOMES CONSTRUCTION CORPORATION

By _____

STATE OF INDIANA)
: ss.:
COUNTY OF TIPPECANOE)

JAMES C. WOOLERY, being duly sworn, says:

I am Executive Vice President of defendant National Homes Construction Corporation and have read the foregoing Answers to Interrogatories and the same are true as to my personal knowledge and information and belief. The grounds of my information and belief are the records and files of defendant and conversations with officers and employees of defendant. The reason this verification is not made by defendant is because said defendant is a corporation and I am an officer thereof.

James C. Woolery

Sworn to before me this

12th day of May, 1975.

Marilyn C. Renfrow

Marilyn C. Renfrow,
Notary Public
My Commission Expires: Sept. 11, 1978

A Yes, sir.

MR. SIMMONS: Could we have both pages marked as one exhibit, please?

(Letter dated March 30, 1973 and attachment marked Defendant's Exhibit P for identification, of this date.)

BY MR. SIMMONS:

Q Mr. Laverty, the letter refers to the fact that bid documents for the South Carolina project are enclosed. What are bid documents?

A I would assume at this point that they were the set of the necessary plans and -- that would be needed for National to start their pricing. This I would -- I called Mr. Duley up and talked to him verbally on the telephone prior to this, and we agreed this would be the quickest way they could get the plans. I notified them by phone first, before I put them on the plane, that they were coming down, and they were to pick them up at the airport upon their arrival.

Q Is it your testimony that these bid documents would have been documents prepared by your firm?

A Yes.

Q They would not have been forms received from the Navy to be filled out for presentation as, or

as part of, the actual bid?

A There were bid documents from the Navy, and they were sent down to them. Exactly when I do not recall. It could have been involved in that; I am not sure.

Q Mr. Laverty, between the time that you sent the letter, Exhibit P, and your meeting on March 6th, had you had any other conversations with Mr. Laverty or anyone else at National Homes?

A Do you mean Mr. Duley or Mr. Payne?

Q I am sorry. What did I say, "Mr. Laverty"? Yes, with Mr. Payne or anyone else. I believe you said you did speak with Mr. Duley.

A Duley, right. I do not recall any specific conversations with any of the gentlemen.

Q You do recall a conversation with Mr. Duley?

A Yes, in order to send those documents down to National. We were trying to get them to them the quickest way possible, and this we decided was the best way.

This was done over the telephone. They said to "get it on the plane, send them down, let us know when."

So I called Mr. Duley ahead of time and let him know when.

Q Was the extent of your conversation with Mr. Duley as to the best way to get these documents to National?

A To my recollection, yes.

Q Is it your testimony, then, that you don't recall any other conversations or any other contacts, be it letter or what, with anyone at National between March 30th, the date of the letter, and March 6th, the date of the meeting?

A I don't recall anything definite, no.

Q Have you been told by anyone at your firm that they were in contact with someone at National, National Homes, during this time?

A Have I been told?

Q Yes.

A No.

Q So as far as you know, there was no contact between National Homes and Wiedersum between March 6th and March 30th,other than your conversation, short conversation, with Mr. Duley?

A As far as I know, no.

Q Now, Mr. Laverty, I show you a copy of a

letter dated April 4, 1973, purporting to bear your signature, and addressed to Mr. Payne at National Homes, and I ask you whether that is in fact a copy of a letter that was sent by you.

A Yes, sir.

MR. SIMMONS: Let's have this marked.

Q Mr. Laverty, I also ask you to look at the second page, what is attached as the second page.

A Yes.

Q I ask you, can you identify that?

A Yes.

Q What is that?

A This, again, is a receipt from the airlines after I put the plans and specifications-- you know, the plans, on the airplane.

Q There appears to be a handwritten notation at the bottom, at the side, really, of the second page. Is that a notation made by you?

A Yes, sir. It is a notation saying that I called Mr. Payne's office and let him know that the plans are on their way.

(Short recess taken.)

MR. SIMMONS: Mr. Reporter, now I ask you to mark this as Defendant's Exhibit Q.

(Letter dated April 4, 1973, from Mr. Laverty to Mr. Payne, and attachment, marked Defendant's Exhibit Q for identification, of this date.)

BY MR. SIMMONS:

Q Mr. Laverty, I have handed you Defendant's Exhibit H, marked at a previous examination in this case, and I ask you whether the plans that you refer to in the letter of April 4th, just marked as Exhibit Q, as those plans.

A Yes, this is one set of them. It looks like it. I believe this was the total set of plans, to my knowledge, yes, it would be. I guess they are all here.

Q I previously asked you, in connection with Exhibit P, the March 30th letter to Mr. Duley, that mentioned in it bid documents -- I asked you about plans. Does this help you to refresh your recollection as to what was sent and when?

A Exactly, no. I would assume that we sent at that time a set of plans, for them to start pricing.

Q You assume that you sent Mr. Duley, as part of the enclosures of bid documents, a set of plans?

A Yes. I said bid documents. I don't know exactly

what I sent. You know, different terminology.

Q Yes, but the plans, Exhibit H, that you have in front of you, would definitely have been at least one set of completed architectural/engineering drawings that you refer to in your letter to Mr. Payne of April 4th?

A Of April 4th?

Q Yes.

A Yes, this is one set.

Q Between April 4th and March 30th, Mr. Laverty, had you had any --

MR. STONE: May I interrupt for one moment?

MR. SIMMONS: Sure.

MR. STONE: May I see Exhibit Q?

MR. SIMMONS: Yes.

MR. STONE: All right.

Q I will start the question again.

Between April 4th and March 30th, Mr. Laverty, had you had any conversations with anyone at National Homes?

A Prior to my sending the plans on the plane?

Q Yes.

A No, to my recollection.

Q The penciled notation on the second page of

Exhibit Q refers to a call to Mr. Payne's office. Would that have been after the plans were actually placed on the plane?

A Yes.

Q What did Mr. Payne say to you and what did you say to him at that time?

A I do not recall except the fact that the plans are on the airplane, and most likely I wished him luck in putting a proposal in.

Q Had Mr. Payne or anyone else at National Homes stated to you at that time, the time of your conversation with him, that National was definitely going to make or submit a bid?

A Well, the contention was -- I don't exactly remember what the date was, whether it was on the 4th or not. The plan of action, so to speak, was that we were to get the plans down to National Homes as quickly as possible and that after -- when they would get our plans, they would put their price with the plans and they would fly it, have someone fly them down to Charleston, the Naval base, and submit them. That was the contention.

Q Now, the "contention." Mr. Laverty, I asked you whether prior to or at the meeting on

March 6th, when Mr.Payne was present, if he told you or anyone else from National had told you prior to that time that National was going to submit a bid, and I believe that your testimony was no.

A No.

Q I believe your testimony was that no one else at your firm had told you that National was going to submit a bid.

A No, that National did not tell us exactly.

Q I am sorry.

A Would you repeat the question?

MR. SIMMONS: Maybe I had better have the reporter read it back.

(Question read.)

MR. SIMMONS: Let me withdraw that question and pose another one, and I think it will help clear matters up some.

Q Mr. Laverty, were you ever told by anyone at National Homes that a bid was going to be submitted?

A Told straight out forth? We were under the assumption of Mr. Gleason's letter --

Q Are you referring to the letter --

A January 29th.

Q January 29th.

A His response to my letter. From that letter we were under the assumption that we were going to proceed with this project on the same premise we did the Charleston job, and it is the same type of project. We were going to proceed in the same manner, and this was our letter from National saying, "Okay, we are with you guys."

And when they kept -- you know, they kept coming into our office, there was no indication at all that they were not going to go with the job.

So it is our intention in our office that they were going to submit a proposal.

Q It was your understanding. But were you told by anyone at National, National Homes, that they were going to submit a bid?

A Well, let me put it -- I could not remember exactly who, but it was brought up how they were going to get the bid down there, and they were going to fly the bid down, and I assume once they flew down to Charleston they were going to submit the bid.

Q Who said this and when?

A It would either be Mr. Payne or Mr. Gleason.

Q When?

A I do not recall exactly. It would have to be probably the 30th, the March 30th conversation that I had with Mr. Duley -- it was in that time span. That was the only way that we could get -- I do not recall the exact conversation or who it was with.

Q Do you recall anything else about the conversation? What did you say during that conversation?

A We just -- we were -- what we said was that we were going to get the plans to them whenever they needed them, and the time limitations were very tight. We both knew that. They told us when they needed the document, how long they have to price them up. They said --

Q How long did they tell you they needed them for?

A They said they needed them approximately six to eight days before. They said it would be very tight, they would have to work overtime, but fine, we would have to work overtime, too.

Q Had anyone asked for more overtime?

A Did they ask for more time?

Q Yes.

A There was no more time to be asked for.

Q I am asking, prior to this conversation, had anyone asked you for twenty days --

A No.

Q -- or for perhaps as much as two weeks?

A No.

Q There was only this one conversation, then, on the time needed by National to work with your plans after they came in?

A To my recollection, I remember talking to someone, and I don't remember if it was someone in our office who had a conversation or not, but this was the time schedule. It was very tight. We worked almost on the same time schedule at the Warminster job. We had our obligation to get the plans completed by the time they needed to put a price on it. It was not that much time available. So we did our job. We had to work our overtime, and they realized the fact that they had to have their six days to put a price on it.

Q Is it your testimony, Mr. Laverty, that the only conversation that you had with National in which someone said that a bid was going to be submitted was between March 30th and April 4th?

A I am only guessing that date. I would not-- I don't know the exact date. I only assume that was the

time. I am only guessing at it.

Q Would it have been around that time?

A I would say probably. Maybe -- maybe a little before that, a little prior to that.

The conversations that we did have as such were very quick, of course, and normally we would try to verify things. but in this type of situation, the time limitation was of essence. It was just something, you know, that you do. We bought ourselves some time when they extended the proposal date. Very similar on the other job.

Q Is it your testimony that it was one conversation?

A On that particular matter?

Q My question was, when were you told by someone at National Homes that it, National Homes, was going to submit a bid? I believe you said that it was in a conversation between the 30th and the 4th. And I am asking whether there was more than one conversation.

A To my recollection, it was the one conversation in which they told us how they were going to get the plans down to Charleston. They were going to fly them down. And I--

Q I want you to tell me anything else about

that conversation, any other detail about that conversation, any other thing that was said.

A Just about our flying the plans down to them ahead of time, make sure they get down there. As I confirmed with Mr. Payne, this is our agreement, we will put them on a particular flight, call them up, let them know they are on their way.

He was going to pick them up.

That was about the essence of it, and he told us, you know, it was their intention of taking the plans and putting their price together and flying -- putting it back together and flying it to Charleston and just deliver it; all they had to do was just deliver it.

Q Mr. Laverty, did you have any other contact with anyone at National Homes after your conversation with Mr. Payne on April 4th?

A No.

Q You have not had any contact with anyone since that time?

A To this date, no, sir.

Well, after, I think, my one memo there. I think we did call them up after the ninety-day period and asked them why they didn't submit a bid. That was a check by us.

Q Let me see if we can find the memo.

Mr. Laverty, you stated that you had a conversation with someone after the ninety-day period was over.

I show you what we have marked as Defendant's Exhibit F. I ask you to take a look at that. Does that refer to the conversation that you just testified to?

A On the bottom --

Q Yes, the handwritten notations at the bottom.

A Yes, that was the first time that we had any contact with National since April 4th.

Q You say the only time "that we had" any contact?

A Wiedersum Associates.

Q Wiedersum Associates. What do you recall specifically saying to Mr. Payne in that conversation?

A Basically I asked him what happened. Told him that I called the Navy to find out what happened. The same procedures we did on the Warminster job. To find out that National Homes did not submit a bid.

And I happened to ask him, I said, "What happened? We did everything and you didn't put in a bid."

Q What did Mr. Payne say to you?

A My best recollection, he just said, "Well, we just decided not to do it, and I thought Mr. Gleason called your office."

I assumed that Mr. Gleason was supposed to contact us and let us know that they didn't submit a bid. But no one ever contacted anybody in our office, to my knowledge.

Q Did you say anything else to Mr. Payne?

A What else could I say to him? That we were terribly disappointed, and that Mr. Wiedersum was quite upset about the fact that, you know, we went to all the expense, and then they just decided not to submit the bid, and didn't even have the courtesy to tell us.

Q What else did Mr. Payne say to you, if anything?

A Nothing, nothing much; just that he thought that Mr. Gleason had informed us, and that was the extent of it. And I just elaborated on the fact that we were disappointed, and that was it.

Q Prior to your call to Mr. Payne, you had discussed this with Mr. Frederic Wiedersum?

A My call to Charleston, yes. I waited ninety days, as I did on the Warminster job. And then I called

DEPOSITION TESTIMONY OF FLOYD J. PAYNE ON
FEBRUARY 27, 1975

131 Q What was that involvement?

A Prior to the submittal of the final documents, I made a call to Wiedersum's office and requested that they send us specific items for the submission that has to do with contract documents which are the Navy forms which are required to be filled out by the person making the submittal of their bid, as well as the contract number, which is given to each bidder.

132 Q Do you recall approximately when in point of time this was?

A I have no idea, no.

133 Q Had you been involved at all in that project before that time?

A Absolutely not.

134 Q Who asked you to make this contact?

A Mr. Gleason did.

135 Q Did he tell you why?

A Yes, I had submitted the document on Warminister and was familiar with the type of documents required for submittal.

136 Q At the time you had this conversation with Mr. Gleason, did you discuss whether or not a bid was

going to be submitted?

A Absolutely not, no.

137 Q What specifically were these--you referred to them as contract documents.

A Contract documents.

138 Q What exactly do those encompass?

A They are Navy forms--I don't recall the numbers or anything on them--but they are Navy forms that have to be filled out, and it has to be in the right context in order for your bid to be accepted.

139 Q What type of information does it call for?

A The company's name, their identification number, the federal ID number, the amount of the bid, any alternate items, alternative items--additive items, in other words--and there is a special form for requirement of any notices similar to the notice there of the time extension of the bid.

140 Q Are these documents part of the bid itself or are they something separate from the bid?

A It is part of the bid itself.

141 Q It is physically submitted as part of your bid

package?

A Yes.

142 Q You say you had obtained these papers from the Wiedersums?

A Yes.

143 Q In other words, the forms had been issued by the government to the Wiedersums?

A That's right.

144 Q And you had to get them and fill them out?

A That's right.

145 Q In the Warminister project, did National fill out these papers?

A Yes.

146 Q Is this work normally done toward the end of the period for the bid or is it something that is sometimes done much earlier?

A No, it is normally done toward the end of the period.

147 Q And you called Mr. Voorneveld?

A As I recall, it was Al that I called, yes, and asked for this information.

148 Q Did he submit that information to you?

A Yes.

149 Q Did you receive a letter from him?

A Yes. I, in turn, turned it over to John Gleason.

150 Q You prepared the documents after you got them?

A No.

151 Q You did not fill--

A I did not prepare the documents, no.

152 Q I thought you said Mr. Gleason asked you to.

A He said because I had prepared the documents on Warminister and since I was familiar with them, he wanted me to accumulate those documents for him, which I did.

153 Q And he was going to fill them in?

A Yes.

MR. SIMMONS: Or someone else?

THE WITNESS: Or, I assume, somebody else. I don't know who did it. I didn't do it.

154 Q You don't recall what date?

A No, I have no idea.

155 Q Did you have any discussion with Mr. Voorneveld about the project at the time you called him?

A No, that was my only involvement with the project

was that call right there.

156 Q Did you receive a letter from Mr. Voorneveld or--

A I received the documents. I don't know if they came by letter, or not--by transmittal letter--I don't know.

157 Q Did you discuss at all with Mr. Voorneveld the completion of the final plans during this telephone call?

A No.

158 Q If I represent to you that the bidding deadline for this project was April 6, would that refresh your recollection as to when this conversation was?

A Absolutely no. No, it would not.

159 Q Did you have any subsequent involvement in this project after this?

A No.

MR. MORRISON: We would request that you produce and identify the letter, if any, that Mr. Duley received from Wiedersum forwarding these documents and that you produce and/or identify specifically what was authorized to him.

MR. SIMMONS: Two items, as far as I am concerned. We have produced the--

MR. MORRISON: I understand you have produced them.

MR. SIMMONS: We have produced--

MR. MORRISON: You have produced your files.

MR. SIMMONS: Let me finish, please.

We have produced and the letter has been marked as an exhibit.

I will check and, if I come across anything that indicates that that was in fact not the letter enclosing the documents that Mr. Duley referred to, that there is in fact another letter, I will produce it for you.

MR. MORRISON: Which letter is it?

MR. SIMMONS: Do you have a copy of the exhibits?

(Off-the-record discussion.)

MR. SIMMONS: As best we can tell, this letter of March 30, 1973, from William Laverty addressed to Mr. Orville Duley. Is

this the letter that accompanied the bid documents?

MR. MORRISON: Now that you have said that, let me ask the witness--

160 Q Mr. Duley, I show you a copy of Defendant's Exhibit P, which is the letter that Mr. Simmons had reference to. Have you ever seen that document before?

A Yes, I have seen it.

161 Q When did you first see it?

A I don't recall. I really don't. I don't recall.

162 Q Have you seen--was the first time you saw it subsequent to the initiation of this litigation?

A Pardon? I didn't understand.

163 Q Was the first time you saw this document after this lawsuit was commenced?

A No.

164 Q You saw it before the lawsuit?

A Yes.

165 Q Did you see it on or about March 30, 1973?

A I assume I did from the date is all.

166 Q Do you recall--as you sit here today, do you have a recollection of receiving this particular

letter from Mr. Laverty on or about March 30, 1973?

A I remember seeing the letter but, as far as the date, I don't recall when it was.

167 Q You do recall receiving the letter?

A Yes.

168 Q Do you recall what came with the letter?

A Absolutely not.

169 Q Do you recall whether this is the letter whereby Laverty forwarded to you what you referred to as contract documents?

A I don't recall.

170 Q Do you have a recollection as you sit here today of actually receiving the contract documents?

A Yes, we received the contract documents.

171 Q Did you receive anything else in that package at the time you received the contract documents?

A I don't recall receiving anything on my desk except that cover letter and the packet which I had requested, the contract documents, being the required submittal form. As you realize, our office--

MR. SIMMONS: Well, you have answered.

Are you answering his question now?

Are you answering his question? If not--

THE WITNESS: Yes, I have answered the question.

MR. MORRISON: You are not going to be able to interrupt answers in Court. You can get away with it on a deposition but--

MR. SIMMONS: I am asking the witness if he is finished with your question. I thought he was rambling on.

If he was still answering your question, he could continue; if he is talking about something else, he has finished his answer and he should stop and I will instruct him to stop.

MR. MORRISON: I understand your instruction perfectly and I understand the reason you made the instruction.

172 Q Do you recall whether or not there was a set of plans enclosed with what you have referred to as contract documents?

A I don't recall, no.

173 Q Who would have opened your mail at this time?

A My secretary.

174 Q In other words, if something came in addressed to you, it would not be opened until it reached your secretary?

A That's right.

(Off-the-record discussion.)

MR. MORRISON: Pursuant to an off-the-record discussion, Mr. Simmons has requested that I put my request that they identify exactly what was received pursuant to the March 30 letter, that I put that in the form of a written interrogatory rather than a request at this deposition, and we shall do that as soon as possible.

175 Q When did you first learn that a bid had not been submitted on the South Carolina project?

A I don't recall. I really don't.

176 Q Was it before this litigation was commenced?

A It was before the litigation, yes.

177 Q From whom did you learn that?

A I don't recall who. General conversation with somebody--I don't know who it was--over lunch or

something like that.

178 Q What were you told?

A That the bid wasn't submitted.

179 Q Were you told why the bid wasn't submitted?

A No.

180 Q Were you told who made the decision not to make a bid?

A No.

MR. MORRISON: Subject to any rulings outstanding, I have no further questions.

MR. SIMMONS: I don't think there are any questions outstanding.

MR. MORRISON: I don't recall. If there aren't, then there aren't. Subject to that, I have no further questions of this witness.

I would like to state again that we would like to be provided--and if you want, I will put it in the form of an interrogatory--but since none of the witnesses we have deposed has had firsthand knowledge, we would like to know (a) when it was decided not to submit a bid; (b) who decided it; and

(c) why that decision was made.

MR. SIMMONS: I have committed myself and will make an effort to comply with the requests that you have previously made.

With respect to the March 30 letter, I asked that you put that into the form of an interrogatory and, while we are doing that, I would request that you put your most recent request in the form of interrogatories.

MR. MORRISON: The one I just gave you?

MR. SIMMONS: Yes. I am not asking at this point that you go back and comb the transcript for the other two witnesses for those requests. I will attempt to honor those. But these most recent requests, please give me interrogatories.

AND FURTHER DEPONENT SAITH NOT.

_____

ARVIL DULEY

STATE OF _____)
) SS:
COUNTY OF _____)

Subscribed and sworn to before me, _____

DEPOSITION TESTIMONY OF ARVIL DULEY ON FEBRUARY 28, 1975

258 Q When was that?

A I can't remember the specific date, but it was a couple or three days before the submission date.

259 Q Did you receive the complete plans or merely one set of plans?

A We received a number of plans and I don't recall at this point how many sets we received for submission.

260 Q Take a look at P there, would you. I am showing you Defendant's Exhibit P, which is a letter from Mr. Laverty to National Homes, attention Mr. Arvil Duley. Have you seen that letter before?

A Just since I have been involved in this case.

261 Q You mean since the litigation?

A Right. I don't recall where I got it nor whose file I was looking at.

262 Q You did not see this letter on or about the time it came in?

A I could have; I could have.

263 Q You just don't recall?

A Either that, or whether I just recently have seen the letter since the litigation, I don't recall.

264 Q What would Mr. Duley's involvement with this

project have been at this time?

A I really can't answer the question, other than the fact that he could have just taken a call for me or John Gleason in our absence, or something.

265 Q What was Mr. Duley's position in the company at this time?

A I believe his title at that time was director of multifamily housing, which he coordinated apartment projects.

266 Q To your knowledge, was he involved in the South Carolina project at all?

A To my knowledge, he wasn't.

267 Q Does this letter refresh your recollection that you received a copy or a set of final drawings from Wiedersum on or about March 30?

MR. SIMMONS: What letter are we talking about?

MR. MORRISON: DXP.

MR. SIMMONS: I think P refers to bid documents.

MR. MORRISON: That's right, and now that you have prompted the witness, we will

let him answer.

MR. SIMMONS: Wait a minute. I didn't intend to prompt the witness.

MR. MORRISON: He can look at the letter. I am asking him if it refreshes his recollection. If it doesn't or if it pertains to something else that was sent, you do not need to tell him what to say.

MR. SIMMONS: I am aware that I do not need to tell him what to say and I did not intend to tell him what to say. It appeared to me your question was not clear. I was asking essentially that you clarify.

You referred to plans and specifications and I pointed out to you that the letter spoke of bid documents.

MR. MORRISON: My question stands: Does this letter refresh his recollection as to whether he received final plans, either a set or more than one set, from Wiedersum on or about the date of this letter, March 30?

A No, the letter does not refresh my memory as to whether or not I received one or more sets on or

about that date.

268 Q You have previously testified that bid documents are forms that the government puts out.

A Right.

269 Q And these forms are filled in by the contractor?

A Right.

270 Q Now do these forms, the bid documents, constitute the bid itself? Or is it merely part of what becomes the actual bid?

A It is part of what becomes the actual bid.

271 Q Do you have a recollection as to when and from whom National received the bid documents on this project?

A No, other than referring to the memo here that was dated March 30, it would have been within a day or so of that.

272 Q Do you recall that you in fact received the bid documents from Wiedersum as opposed to receiving them from, say, the government?

A We received them from Wiedersum. There was no reason that National could have received them from the government.

273 Q Are bid documents normally sent to the contractor

within a week or so of the time the bid is due?

MR. SIMMONS: By whom?

MR. MORRISON: By whomever they normally come from.

A The bid documents normally come through at the time you request permission to bid the project.

274 Q And that is early on in the game?

A Right, yes.

275 Q Even before the preproposal conference?

A I believe they do come with--yes, in this case, this was, as I recall, step one to bidding at the same time, and I believe it would be normal practice for the bid documents to come along with your initial Statement of Work.

276 Q And that would be early in the process?

A Right.

277 Q Do you have a recollection as to whether or not National received those bid documents early on in this project?

A No, we could not have received them, other than through Wiedersum.

278 Q I understand that. My question is: Do you recall

whether you received them?

A Specifically, no, other than referring to this.

279 Q Do you have a recollection aside from this letter? Do you have a present recollection that you only received the bid documents a week before the bid was due?

A I don't recollect receiving the bid documents.

280 Q Do you recall having any conversation with Mr. Laverty on or about March 30 wherein the two of you discussed the mailing of a set of final plans and a plan to mail an additional eight sets a few days later?

A I definitely recall pressuring him for a set of final plans and, at the same time, I cannot recall receiving the plans. I'm not saying I didn't. I just don't recall receiving the plans until we received the group of them for submission.

281 Q That being April 5, or so, 4th or 5th?

A Fourth or fifth, whenever they came in.

282 Q You have no recollection of receiving one set of final plans prior to the time you got a package?

A No, I don't. I could have. I don't have any recollection.

283 Q Do you recall discussing this matter with Mr. Laverty on the phone? You say you recall pressuring. Do you recall what was said?

A I definitely recall discussing with him the importance of getting the final drawings where I could get all my prices, my coordination work and everything together prior to the week of the bid.

284 Q But you don't recall what date this was?

A No, I don't.

285 Q Do you recall discussing with him that the plan would be for National to hand-carry the final bid or the actual bid to South Carolina and submit it?

A No. The importance of my conversation with Laverty in respect to this was the fact that I needed the final set of drawings for Bolka to reconfirm prices with subcontractors prior to our completing our cost estimate.

286 Q Is it your testimony that you do not recall any discussion with Mr. Laverty regarding a plan whereby National would have someone hand-deliver the final plan to the Navy in Charleston?

A Yes, I recall that. We were talking about two different things now.

287 Q Okay. I'm sorry.

MR. SIMMONS: Okay. You have answered his last question.

288 Q What do you recall about this matter? I thought you said you didn't recall.

A May I continue from where I was?

289 Q Sure, please do.

A The important thing to me was to get a revised and complete set of plans that I could get in the region in South Carolina for Mike Bolka to have the subcontractors look at and reconfirm their price: okay, my price was good; or, no, you show something here that wasn't on the preliminary plans. You confirm your price. Now we are going in with it.

Also, in addition to that, I know that I explained to him that it takes time to get out duplicate sets. In other words, it takes printing time for these six or eight sets, whatever we have to have for submission. But I told him that those could be mailed subsequent to the plan that I was asking for. That could be mailed three or four

days prior to our submission date.

290 Q In other words, what you needed was one complete final plan that you could have Mr. Bolka take?

A Correct.

291 Q He would physically take it to South Carolina?

A Correct.

292 Q And talk to the subcontractors?

A Correct, and this is the plan that it takes approximately, oh, it takes two or three days to check it against your preliminary plan and it would take four or five days to get it out to the subcontractors and have them to reconfirm.

Then, after all this is done, then we are prepared then to put our package together for submittal.

293 Q So how many days total would you need to have the final plan before you submitted it? About a week?

A No, I didn't say that. He should have six or eight days--ten days--the more the better.

294 Q And you told that to Mr. Laverty?

A I can't remember specific days that I told him, but this was the essence of the conversation.

And I don't recall--probably I did, without a doubt, tell him that I needed a plan a number of days before, but I don't recall.

295 Q Did you ever tell him that if you got it less than ten days before the bid was due to be submitted that you could not complete the bid in time?

A No, I would have no reason to tell him that. That was out of my authority.

296 Q You stated that you would have liked to have had a week to ten days and you are not sure exactly what you told him, but you may have told him that you needed a week to ten days. My question is--and maybe you answered this, but your answer was not clear to me--my question is: Did you tell him that if you didn't have the full ten days that National would not have enough time to prepare and submit the bid?

A I could have and more than likely did insinuate that unless we had the plans X number of days prior to submission that it would be impossible to get out the bid package. However, that is beyond my authority to tell him words of that nature. I would have to make my report, official

report, to my superior and he would take it from there.

297 Q My question is not what you did or did not insinuate. My question is: Do you recall--

A I don't recall.

MR. SIMMONS: I think he has answered it.

298 Q Do you recall whether you discussed with Mr. Laverty whether six days would be sufficient time for National to do what had to be done to complete the bid and get it submitted?

A I don't recall.

299 Q Do you recall that there came a time when you did receive the final completed plans from Wiedersum?

A I do.

300 Q Do you recall how many days before April 6th that was?

A I believe either the 3rd or 4th of April.

301 Q I believe you testified previously that you don't recall whether you got one set and then some more later or whether all seven or eight sets came in together; is that correct?

A I don't recall getting the separate set. I could have. I just don't recall getting it.

302 Q You recall getting the complete set?

A Right.

303 Q And you have no recollection one way or the other on getting an earlier set?

A Right.

MR. MORRISON: Mr. Simmons, would you request that National produce for us whatever materials it is that they claim was received from Wiedersum pursuant to Mr. Laverty's letter of March 30, which I believe is Exhibit P.

MR. SIMMONS: What is referred to as the "bid documents"?

MR. MORRISON: Yes.

MR. SIMMONS: They may well have already been produced. I don't know. I will check.

(Off-the-record discussion.)

304 Q Showing you Plaintiff's Exhibit 6, a letter from Mr. Laverty to the Department of the Navy, dated April 2, 1973, which shows a copy being sent to

National Homes, attention: Mr. John Gleason, have you seen that document before?

A Yes, I have.

305 Q Roughly, when did you see that the first time and what were the circumstances?

A On or about the bidding date.

306 Q What were the circumstances under which you yourself saw that letter?

A I believe I discussed this with Bill Laverty since they had made the request and had taken out the plans and specs in Wiedersum's name, that the Navy would not recognize National's bid because the bids have to be submitted by identification number, and we had no identification number and, as a result of that conversation, Laverty had the Navy transfer their ID number to National.

307 Q Who initiated this discussion: you or Mr. Laverty?

A I can't recall.

308 Q I take it from what you just said that you told Mr. Laverty that because the number was assigned to Wiedersum it would have to be reassigned.

A Correct. It was during the conversation. I couldn't say if I called Laverty or Laverty called

me, but that was the essence of the conversation.

309 Q Take a look at Exhibit E. Do you recall seeing that letter before?

A Not prior to the litigation.

310 Q Did you ever discuss the subject matter of the letter and the amount of Wiedersum's fee with either anyone from Wiedersum or with Mr. Gleason at any time prior to this litigation?

A No, sir, I did not.

311 Q Have you ever discussed the contents of this letter with Mr. Gleason at any time?

MR. SIMMONS: I think he has testified that he didn't know of the letter.

MR. MORRISON: I understand that, but my question is at any time.

MR. SIMMONS: Well, prior to the litigation?

MR. MORRISON: Prior to--

A I have not discussed this letter with Gleason prior to or after the litigation and I did not see the letter until after the litigation.

MR. SIMMONS: I think you have said

that.

312 Q As a general rule, would the contractor have to know the amount of the architect's fee before making a bid?

A It would be considered customary practice that they know before but, here again, this would not be a part of my cost package.

MR. MORRISON: Would you show him Exhibit Q, please.

313 Q Did you receive this letter from Mr. Laverty on or about the date indicated, April 4th?

A Sometime about that date, I believe.

314 Q And did you receive with the letter the eight sets of architectural engineering drawings referred to there?

A I don't recall if a letter came with the drawings or whether the letter came separately. I would assume, since it does not mention under separate cover, that it came attached to those drawings.

315 Q Did you have any telephone conversation with Mr. Laverty regarding this correspondence, either before or after--

A I believe that he called me and advised me that he was putting the plans on the plane on this date.

MR. SIMMONS: I'm sorry--that he was or was not?

THE WITNESS: That he was.

316 Q And what did you say to him?

A I don't recall, other than, "I'll pick them up," or something to that effect.

317 Q Did you tell him it was too late to submit the plans?

A No.

318 Q Was it too late?

A In my opinion it was.

319 Q But you didn't tell him that?

A No. That was beyond my authority.

320 Q Did you tell him during this telephone conversation that National would be submitting the bid, would have the bid flown to South Carolina and would submit it?

A I don't recall the exact verbage. It could have been in this conversation or it could have been

prior to but, normally, it was standard procedure: we would fly the bids to wherever they were to be delivered.

321 Q And so you did tell him that?

A I don't recall telling him, but it sounds reasonable that I would have told him.

322 Q And if you would have told him that, it wouldn't have been too late?

A Pardon me?

323 Q If you told him you were going to fly the bid to South Carolina for submission, then it wouldn't have been too late?

MR. SIMMONS: I object to the form of that question. Do you want to reword it? It calls for an assumption on the part of the witness. I am not going to let him answer.

MR. MORRISON: Mr. Simmons, it is highly improper to direct a witness not to answer when your only objection is as to the form of the question.

The objection is on the record. You should allow the witness to answer and then,

if your objection is well taken, the answer doesn't get read in Court, but you have no right to direct a witness not to answer when your objection goes to the form.

MR. SIMMONS: Please don't instruct me what I have a right to object to and what I can do. Your question calls for an assumption and I don't think it is proper and I don't think it can be answered in that sense.

I am not going to argue with you about it.

324 Q Mr. Payne, you have testified that you probably discussed with Mr. Laverty that the plans would be--that the bid would be put on a plane and flown to South Carolina; is that correct?

A I testified to that, but I also testified that I could not recall whether it was this conversation or a previous conversation.

325 Q I will refer you to the second page of DXQ, which is a handwritten notation on the shipping ticket, and I'll just read this for the record. I believe this is in Mr. Laverty's handwriting. "Called Floyd's office to confirm that plans

were on the way. Material would be there--National would be there to pick up plans on April 6. They will fly plans and proposal to South Carolina." Does that refresh your recollection that you in fact told that to Mr. Laverty during this telephone conversation?

A No, that does not refresh my recollection as to which conversation it could have been or it could not have been. It could have been prior to this. It could have been this. I just don't recall.

326 Q Was April 4, 1973, too late for you to get the finished plans from Wiedersum and submit a bid in South Carolina by the 6th?

A If, in fact, these plans we are talking about here were the only revised and complete plans I had, definitely, yes.

327 Q But if you had gotten some plans--if this was not the first occasion on which you got the final complete plans, it wouldn't have been too late?

MR. SIMMONS: Hold on a second.

MR. MORRISON: Let the witness answer, please.

MR. SIMMONS: I want to make sure I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against- AFFIDAVIT

NATIONAL HOMES CONSTRUCTION CORPORATION, 74 Civ. 823

Defendant.

- -x

STATE OF INDIANA)
: ss.:
COUNTY OF TIPPECANOE)

JAMES C. WOOLERY, being duly sworn, says:

1. I am an Executive Vice President of defendant National Homes Construction Corporation. I have knowledge of the facts hereinafter stated and make this affidavit in support of defendant's motion for summary judgment.

2. From late January through March, 1973, plaintiff and defendan rked together to investigate the possibility of submitting proposal to the Department of the Navy to construct 200 family housing units at the Naval Weapons Station, Charleston, South Carolina (the "South Carolina Project"). Both plaintiff and defendant were interested in submitting a successful proposal for the South Carolina Project and both parties worked quite hard in that connection. As the date on which the proposal had to be submitted drew close, defendant decided against submitting a proposal. Chief among the reasons for that decision was the fact that final plans were required from the architect, in this case

the plaintiff, in sufficient time to allow the construction firm, defendant, to review them and to obtain firm commitments from subcontractors and materialmen but the final plans arrived too late, in defendant's opinion, to allow the complicated work of reviewing them and of pricing and obtaining commitments to be done adequately. Defendant did not inform plaintiff that a proposal was not being submitted. Defendant's various employees assumed that others had taken care of informing plaintiff. While the failure to so inform plaintiff was unfortunate as a matter of courtesy, it falls far short of a breach of duty, and certainly caused plaintiff no damage. Defendant had every right not to submit a bid under the circumstances; plaintiff's position was in no way prejudiced by the lack of prompt notice.

3. It was at all times understood that either party, prior to the submission of a proposal, could decide that it was no longer interested in bidding for the contract. Prior to the South Carolina Project, the parties had on various occasions worked together to investigate submitting proposals for other projects. Sometimes, proposals were submitted and, at other times, one party or the other decided that it was not interested. The only difference here is that defendant forgot to inform plaintiff of its decision to submit a proposal. Plaintiff's pique has festered into this lawsuit.

4. At one time, plaintiff and defendant did have a written contract dated March 29, 1971 (a copy of which is annexed hereto as Exhibit A) concerning proposals that were then being accepted by the New Jersey Educational Facilities Authority for the construction of student housing (the "New Jersey Project"). I negotiated that contract on behalf of defendant. The contract related solely to the submission of

proposals for construction contracts for the New Jersey Project and was not applicable to the South Carolina Project. Yet, even if the dealings between plaintiff and defendant in connection with the South Carolina Project had been governed by the terms of the contract for the New Jersey Project, there still would have been no duty on defendant's part to submit a proposal.

5. Paragraph 6b of the contract read as follows:

> "Submission of Bid. National will submit a bid in a amount computed in accordance with Paragraph 5 of this agreement on any proposal on which Wiedersum and National agree that National should bid. National and Wiedersum agree to indemnify each other against any damages, losses and liabilities arising out of their own acts, or negligence in the performance of this agreement." (emphasis added)

6. The contract for the New Jersey Project also clearly sets forth in paragraph 4 that each party was to bear its own expense for any work in putting together a proposal. According to paragraph 8 of the contract, plaintiff would not receive anything unless the proposal was successful and a construction contract awarded.

7. Clearly the contract imposed no obligation on either party to submit a bid. It was only when the parties agreed to put in a proposal that any obligation arose. The New Jersey Project covered a number of construction jobs in New Jersey that were being bid for separately. In some cases plaintiff and defendant put in a proposal and in other cases they did not. However, under no circumstances would any construction firm agree to put in a proposal on a project prior to having an opportunity to examine carefully the final plans and to gather all the relevant cost data. Without sufficient time to review the final plans prior to the submission of a proposal, an error could have slipped by undetected

with disastrous consequences for all concerned. In the case of the South Carolina Project, defendant did not feel that it had sufficient time from date of its receipt of the plans from plaintiff to either make the necessary review or to obtain commitments from subcontractors. 76a

James C. Woolery

Sworn to before me this
13th day of October, 1975.

Notary Public

My Commission Expires October 12, 1976

EXHIBIT A - AGREEMENT DATED MARCH 29, 1971
BETWEEN NATIONAL HOMES CONSTRUCTION CORPORATION
AND FREDERIC P. WIEDERSUM ASSOCIATES ANNEXED
TO FOREGOING AFFIDAVIT

Exhibit A

AGREEMENT

This Agreement is made and entered into this 29th day of March, 1971, by and between National Homes Construction Corporation, an Indiana corporation, with main offices at Earl Avenue and Wallace Street, Lafayette, Indiana, (hereinafter referred to as "National" and Frederic P. Wiedersum Associates, a partnership, with main offices at 65 Roosevelt Avenue, Valley Stream, New York 11582, (hereinafter referred to as "Wiedersum"

WHEREAS the New Jersey Educational Facilities Authority has announced a building program for the next few succeeding years encompassing, in part, the purchase of quality, low-rise student housing;

WHEREAS, Wiedersum has the knowledge and ability to design such housing; and

WHEREAS, National has the ability to fabricate and erect such housing if suitably designed,

NOW THEREFORE, National and Wiedersum agree as follows:

1. Engagement of Wiedersum by National. National hereby engages Wiedersum to design quality low-rise student housing acceptable for purchase by the New Jersey Educational Facilities Authority. The final design shall be for units to be factory manufactured within the panelized technique to be erected on sites chosen by the New Jersey Educational Facilities Authority.

2. Status of Wiedersum. At the performance of all services under this Agreement, Wiedersum is and shall at all times, remain in its relation to National an independent contractor, acting in accordance with its own ideas, and exercising its best professional judgment in the design of the housing units. Wiedersum is not and shall not represent itself as an agent of National nor shall Wiedersum act for or on behalf of National.

3. Design Phase--Obligations.

a. Obligations of Wiedersum. During the design phase, the obligation of Wiedersum's engagement by National shall be to design and engineer all structures and auxiliary plumbing, heating, and electrical and other systems in accordance with the specifications of the New Jersey Educational Facilities Authority. Wiedersum shall produce preliminary drawings; working drawings; and all other presentations required by the New Jersey Educational Facilities Authority on any particular bid.

b. Obligations of National. During the design phase, National shall be obligated to provide architectural and engineering design assistance to Wiedersum. In addition, National shall be obligated to determine the cost of fabrication and erection of housing designed by Wiedersum on any particular site. Since Wiedersum will have no responsibility in establishing the construction costs or inspection during the construction phase, Wiedersum shall have no responsibility for construction methods or any deficiencies in any bid or bids and such responsibility shall be solely that of National.

4. Expense of Design Phase. Each of the parties hereto shall perform the obligations specified in paragraph 3 of this agreement at its own expense.

5. Determination of Amount of Bid. At the time of "final costing" for any one proposal, the amount of the bid will be determined in the following manner. National will gather bona fide subcontractor and material supplier bids or quotes on all items of "direct construction expense". National will estimate the job overhead cost for each site. National will combine all direct construction expenses and all estimated job overhead costs resulting in total direct construction costs of all construction work to be performed relevant to any particular bid. To the total direct construction costs will be added National's fee and Wiedersum's fee. The fee of National and the fee of Wiedersum is to be determined independently by each. The sum of Wiedersum's fee, National's fee, direct construction expense, and estimated job overhead costs will determine the amount of the bid on any particular site.

6. Bidding Phase

a. Bid Bond. National will provide the required bid bond on any proposal on which Wiedersum and National agree that National should bid. The cost of the bid bond shall be included as a part of National's direct construction expense.

b. Submission of Bid. National will submit a bid in an amount computed in accordance with paragraph 5 of this

agreement on any proposal on which Wiedersum and National agree that National should bid. National and Wiedersum agree to indemnify each other against any damages, losses or liabilities arising out of their own acts, or negligence in the performance of this agreement.

7. Construction Phase

a. Obligations of National. Upon acceptance of any particular National bid by the New Jersey Educational Facilities Authority, National will enter into a Construction Contract with the New Jersey Educational Facilities Authority or its designated agent. National shall be responsible for all on-site building functions and construction supervision.

b. Obligations of Wiedersum. Wiedersum shall have no responsibility for the performance of construction work. However, Wiedersum will cooperate with National should any problems arise relating to the design phase.

8. Payment of Wiedersum's Fee. Wiedersum will recieve 50% of his fee, established in the bid proposal for a particular site, upon the execution of an agreement between National and the New Jersey Educational Facilities Authority. An additional 25% of his fee to be paid upon the completion of 50% of the construction project and the last 25% of his fee upon the completion of the construction project.

9. Term and Cancellation. This Agreement shall commence on the date of its execution by both parties hereto and shall remain in effect until cancelled.

Either party may cancel this agreement upon written notice to the other in the events of:

(1) breach of this agreement, or

(2) At any time that it may be mutually agreed the contract shall be terminated.

(3) As of December 31, 1975.

whichever event may first occur; provided however, that the happening of any of the foregoing shall not be deemed to require a cancellation except upon the option of either or both of the parties.

10. Property. All preliminary drawings, working drawings, and all other presentations prepared by Wiedersum required by the New Jersey Educational Facilities Authority on any particular bid shall be and remain the property of Wiedersum.

11. Reservation: National Homes Construction Corporation is the wholly-owned subsidiary of National Homes Corporation. National Homes' manufacturing subsidiaries shall have the right to bid on projects proposed by the New Jersey Educational Facilities Authority as material suppliers to third parties on plans and specifications created by other architectural firms. However National Homes Construction Corporation will not enter into negotiations, bid or construct any units for the New Jersey Educational Facilities Authority during the term

of this agreement.

12. Notices. Any claimed breach of this Agreement and all notices hereunder must be made in writing to the other party by certified mail, postage prepaid.

If to National to:

Secretary-Treasurer
National Homes Construction Corporation
P.O. Box 680
Lafayette, Indiana 47902

If to Wiedersum to:

Frederic P. Wiedersum Associates
65 Roosevelt Avenue
Valley Stream, New York 11582

13. Assignment. Neither party to this Agreement shall assign it, in whole or in part, without the written consent of the other. However, National may assign any monies due or to become due to it hereafter as the result of execution of any construction contract contemplated hereunder so long as the interest of Wiedersum in its fee is not impaired.

14. Integration. This Agreement contains the entire agreement between the parties and no promise, verbal or written, and regardless of when made, shall have any force or effect or be included herein.

15. Severability. If any provision of this Agreement should be held invalid, the validity of the remainder shall not be affected thereby.

16. Governing Law. This Agreement shall be governed by the laws of the State of Indiana.

17. Waiver. No waiver by National of any requirements herein shall be deemed a waiver of its right to the subsequent enforcement of such requirements. No waiver by either party hereto of any breach of this Agreement shall constitute a waiver of any subsequent or continuing breach.

18. Headings. Headings preceding each paragraph of this Agreement are inserted for convenience of reference only and shall not be construed or interpreted as part of the terms of this Agreement.

IN WITNESS WHEREOF, the parties hereto have affixed their hands, all as of the day and year first above written.

NATIONAL HOMES CONSTRUCTION CORPORATION

By _____
Executive Vice President

Attest: _____
Secretary

FREDERIC P. WIDDERSUM ASSOCIATES

By _____

Attest: _____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against-

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant.

- -x

AFFIDAVIT

74 Civ. 823

STATE OF OHIO)
: ss.:
COUNTY OF MONTGOMERY)

FLOYD J. PAYNE, being duly sworn, says:

1. I am a Project General Manager with defendant National Homes Construction Corporation. I have knowledge of the facts hereinafter stated and make this affidavit in support of defendant's motion for summary judgment.

2. During the time period relevant to this lawsuit, I was a team leader in defendant's Estimating Department and was the individual with defendant who had day to day contact with plaintiff's personnel in connection with the project for the Department of the Navy to construct 200 family housing units at the Naval Weapons Station, Charleston, South Carolina (the "South Carolina Project"). The only other individual at defendant who had more than passing contact with plaintiff in connection with the South Carolina Project was John Gleason, then a Vice President and my immediate supervisor.

3. I first became aware of the South Carolina Project shortly after the matter was brought to defendant's

attention by plaintiff's letter dated January 23, 1973 (a copy of which is annexed hereto as Exhibit "A"). Plaintiff, with whom defendant had worked in the past on several projects, asked whether we might be interested in working on still another project. John Gleason's letter to plaintiff dated January 29, 1973 (a copy of which is annexed hereto as Exhibit "B") expressed such an interest and I was assigned the job of exploring the nature of the project.

4. Contrary to plaintiff's contentions contained in its complaint, no representation or agreement was ever made that defendant would submit a proposal for the South Carolina Project. The very nature of the task of putting together a proposal for a project as large as the South Carolina Project would prevent a decision from being made as to whether or not a proposal should be submitted before all of the necessary plans were completed and all of the necessary information was in and the amount of the bid, which is part of the proposal, had been calculated. The process of putting together a proposal is an exceedingly difficult task involving the successful resolution of many problems, some of which in almost all cases are unanticipated at the outset. Any one of the problems could result in the effort being aborted. Until all of the problems are resolved, it is meaningless to speak of a decision being made to submit a proposal. In the present case, the shortness of time available for defendant to review plaintiff's final plans resulted in defendant deciding not to go through with the submission of a proposal.

5. The procedure followed by the Navy in seeking proposals for the South Carolina Project was similar to that followed in respect to other projects involving a public

authority or the military on which plaintiff and defendant had worked together in the past. After the Navy sent out an invitation to submit proposals along with its specifications for the construction, a pre-proposal conference was held for potential bidders. The purpose of the conference was to give the potential bidders an opportunity to view the construction site and to obtain additional information and a better understanding of what was expected.

6. The pre-proposal conference for the South Carolina Project was held on February 20, 1973 and the date on which proposals were submitted was April 6, 1973. In order to put in a proposal, it was necessary during that period for plaintiff to draft preliminary architectural and site plans and for defendant as the construction firm to review them to make certain that they fitted the specifications of the Navy and that the facility designed was one which defendant was capable of constructing. While the review was underway, defendant was using the preliminary plans as a basis for obtaining bids from subcontractors in the Charleston area. Changes in the preliminary plans had to be incorporated into final plans which defendant would then use to obtain final commitments from subcontractors. Once the final bids from subcontractors were in, defendant would calculate the various costs and prepare the amount of its bid which had to be carefully determined to provide a profit on the project while at the same time remaining competitive with the bids contained in other proposals.

7. For a project the size of the South Carolina Project, at least 60 days should have been allowed by the Navy between the pre-proposal conference and the date for submission of proposals in order to allow sufficient time

to do all of the required work. The time allowed was approximately 45 days; so plaintiff and defendant started under severe time restrictions. The restrictions became even more severe when a visit to the Charleston area to line up subcontractors and to review plaintiff's preliminary plans against the actual conditions disclosed a number of unanticipated problems. The soil conditions were found to be different than had been assumed. Various swamp areas were found which did not appear on plaintiff's preliminary plans. The result was that additional calculations and plan revisions were required.

8. In order to have afforded defendant sufficient time to review the final plans and to obtain reconfirmations from subcontractors, the final plans should have been in defendant's hand from 8 to 10 days prior to the date specified for submission of proposals (April 6). The minimum amount of time needed was 6 to 8 days, and I personally informed William Laverty of plaintiff's office of that fact. It would require 2 to 3 days to check the final plans against the preliminary plans, and 4 to 5 days to get the subcontractors to reconfirm their bids. Of course, there was no guaranty that everything could be done in 6 to 8 days, but to do the job properly at least that much time was required.

9. We still had not received the final plans on April 2. When I informed John Gleason of the fact that we did not have the information needed to proceed with the preparation of an intelligent bid, he instructed me to stop all work and said we would not put in a proposal. Eight sets of final plans arrived with a letter from plaintiff dated April 4, 1973, two days before proposals were required to be submitted.

10. When I subsequently spoke with personnel from plaintiff's office, I did not mention the fact that we were not putting in a proposal because I assumed that John Gleason had relayed that fact to plaintiff or was in the process of doing so. It was only some months after the submission date that I discovered plaintiff had not been informed that a proposal had not been submitted. 88a

Floyd J. Payne

Sworn to before me this

day of October, 1975.

Notary Public

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

FGW ✓
RCW ✓
LJS ✓

FILE

January 23, 1973

Mr. John Gleason
National Homes Construction Co.
P.O. Box 860
Earl Avenue
Lafayette, Indiana 47902

Dear Mr. Gleason:

We are interested in submitting a proposal along with National Homes for the construction of 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina. The specifications and other detailed information are being rent to our office and I will forward a copy to your office.

If we employ the methods we discussed in our office on December 20, 1972, we should both be able to get this proposal out at minimum cost.

The funds available are quoted at $3,904,000.00. Hopefully, we will be able to use our last housing designs, with slight modifications.

The date for proposal submission is March 16, 1973. A preproposal conference is scheduled for February 14, 1973 in South Carolina.

Very truly yours,

William G. Laverty

WILLIAM G. LAVERTY
jcw

DEF. EX. C
FOR ID. 9-12-74
HARVEY D. KRAMER
REPORTER

GHV

EXHIBIT B - LETTER DATED JANUARY 29, 1973 FROM JOHN GLEASON TO WILLIAM G. LAVERTY

January 29, 1973

Mr. William G. Laverty
Frederic P. Wiedersum Associates
65 Roosevelt Avenue, Box 365
Valley Stream, New York 11582

Dear Mr. Laverty:

This is in answer to your letter of January 23 concerning 200 Family Housing Units at the Navel Weapons Station, Charleston, South Carolina. National looks forward to the opportunity of submitting a proposal along with Frederic P. Wiedersum Associates on this Project.

After we have received the specifications and have had a chance to review same, I feel it advisable that our people who have been working on the Air Force Projects meet with your people to discuss the proposal in more detail. I would further propose that our architect and estimator attend the preproposal meeting, along with people from your office on February 14 only because of the many meetings they have recently attended and the fact that they might ferret out some information otherwise missed that will be helpful to you in the development of the plans.

I will await word from you as to the time and place of our meeting.

Very truly yours,

NATIONAL HOMES CONSTRUCTION CORPORATION

John Gleason
Vice President

JG:dmh

DEF. EX. D
FOR ID. 9-12-74
HARVEY B. KRAMER F/C
REPORTER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FREDERIC P. WIEDERSUM ASSOCIATES, Plaintiff,	:	
-against-	:	AFFIDAVIT
NATIONAL HOMES CONSTRUCTION CORPORATION, Defendant.	:	74 Civ. 823

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HARRY L. SIMMONS, being duly sworn, says:

1. I am an attorney associated with the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant. I have knowledge of the facts hereinafter stated and make this affidavit in support of defendant's motion for summary judgment pursuant to F.R.C.P. Rule 56(b) on the ground that there are no triable issues of fact and defendant is entitled to judgment as a matter of law.

2. This action was commenced in the Supreme Court of the State of New York, County of Nassau, on May 2, 1974 by service of a summons and complaint (a copy of which is annexed hereto as Exhibit A). On May 31, 1974, defendant filed with the Office of the Clerk of this Court a petition for removal pursuant to 28 U.S.C. § 1441, on the grounds of diversity of citizenship and amount in controversy.

3. The complaint sets forth five causes of action. It is alleged in the first cause of action that plaintiff, an

architectural and engineering firm, and defendant, a construction firm, entered into a written contract on May 29, 1971, pursuant to which plaintiff agreed to design student housing which defendant agreed to construct in the event that a construction contract was awarded by the New Jersey Educational Facilities Authority (the "New Jersey Project"); that defendant was obligated to submit a bid to the New Jersey Educational Facilities Authority on each project that the parties agreed to work on; that the parties would indemnify each other for damage, loss or liabilities arising out of their own acts and performance of the agreement; that in January 1973 plaintiff and defendant agreed to submit a bid on a 200 unit family housing project at the Naval Weapons Station, Charleston, South Carolina, to be constructed for the Department of the Navy (the "South Carolina Project"); that in connection with the South Carolina Project, the parties agreed to be bound by the terms of their agreement for the New Jersey Project; that plaintiff performed whatever work was required of it to submit the bid and informed defendant that its fee in the event the bid was accepted would be $250,000; that defendant failed to submit the bid after representing that it would do so; and that defendant's breach of its representations and agreement render it liable to plaintiff in the amount of $250,000.

4. The second cause of action merely reasserts the allegations of the first and further alleges that plaintiff expended time, labor and expense in preparing plans for the South Carolina Project at defendant's request and therefore

is entitled to recover from defendant the reasonable value of its services which were said to be $250,000. The third cause of action alleged that defendant made material misrepresentations in order to induce plaintiff to provide its service without just compensation and that plaintiff in reliance upon the alleged representations was damaged in the amount of $250,000. The fourth cause of action alleges that defendant was careless and negligent in failing to submit a bid for the South Carolina Project and that such alleged negligence damaged plaintiff in the amount of $250,000. The fifth cause of action alleges that, had defendant submitted a bid, it would have been successful and plaintiff would have received its fee of $250,000 but by virtue of defendant's failure to submit a bid, plaintiff was damaged in that amount.

5. On June 7, 1974, defendant served its answer (a copy of which is annexed hereto as Exhibit B), which denied all of the material allegations of the complaint and asserted the statute of frauds as an affirmative defense.

6. From late January through March, 1973, plaintiff and defendant did work together to investigate the possibility of submitting a proposal for the South Carolina Project. Floyd J. Payne, who is now a Project general manager with defendant and at the time was a team leader in defendant's estimating department, was involved with the day to day dealings between the parties in connection with the New Jersey Project and the facts relating thereto are set forth in his affidavit which is submitted herewith. As is clear from the Payne affidavit, defendant at no time promised or represented to plaintiff that it would submit a proposal for the South Carolina Project.

The Payne affidavit further states that defendant had informed plaintiff that the final plans for the South Carolina Project had to be received by defendant at least six to eight days prior to the submission date of April 6, 1973. When the plans had not arrived on April 2, 1973, the decision was made not to submit a proposal because defendant did not have sufficient time to do the necessary work prior to the submission, but defendant inadvertently failed to inform plaintiff of that decision.

7. At one time plaintiff and defendant did have a written contract dated March 29, 1971 concerning proposals that were then being accepted for the New Jersey Project. James C. Woolery, Executive Vice President of defendant, negotiated that contract on behalf of defendant and his affidavit is being submitted herewith. From the Woolery affidavit it is clear that the contract related solely to the New Jersey Project and was not related in any way to the South Carolina Project. It is further stated that there would be no obligation on defendant's part to have submitted a proposal under the contract for the New Jersey Project unless plaintiff and defendant specifically agreed that such a proposal would be submitted and defendant would not have made such an agreement under any circumstances prior to receiving final plans from plaintiff.

8. The deposition of plaintiff has been taken through various of its employees and partners. The transcripts of those depositions will be handed to the Court on the return date of this motion. The following admissions were made:

a. Plaintiff was informed that defendant needed the final plans from six to eight days prior to the submission date for the proposal. (Laverty p. 73)

b. It was plaintiff's understanding at all times that it was to bear its own costs and expenses in connection with drafting plans for any proposal. (Laverty pp. 37-39, Voorneveld pp. 29-30).

c. Neither plaintiff nor defendant could have decided to submit a proposal prior to the pre-proposal conference (February 20, 1973). (Laverty pp. 53-56, Voorneveld pp. 16-17)

d. The only statement made by defendant after the pre-proposal conference that a bid would be submitted occurred during a telephone conversation that William Laverty of plaintiff's office had with someone from defendant's office shortly before April 6 in which the mechanics for delivery of the proposal were discussed and Laverty was told that the plan was to fly the proposal to South Carolina. (Laverty pp. 70-71, 72, 75-76)

e. The Navy considered factors other than the amount of the bid contained in the proposal in determining the successful bidder and such factors included judgments as to design, utilization of space, lay-out and other matters. (Laverty pp. 25-28)

f. Plaintiff's fee of $250,000 in the event that defendant was awarded a contract by the Navy was based on a percentage of plaintiff's estimate as to the total construction costs and was not related to any costs or expenses incurred by plaintiff. (Laverty p. 82)

WHEREFORE, it is respectfully requested that summary judgment be entered in favor of defendant for the reasons set forth herein and in the affidavits of Floyd J. Payne and James C. Woolery and defendant's memorandum of law submitted herewith.

Harry L. Simmons

Sworn to before me this
3rd day of November, 1975.

NORMAN R. [illegible]
NOTARY PUBLIC, State of New York
No. 01-[illegible]
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, :

-against- : 74 Civ. 823 (WB)

NATIONAL HOMES CONSTRUCTION CORPORATION, :

Defendant. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS C. MORRISON, being duly sworn, hereby deposes and says:

I am a member of the firm of Rogers & Wells, attorneys for plaintiff in the above entitled action. I am fully familiar with the prior proceedings and discovery in this case.

The documents annexed hereto are true and accurate copies of documents which were produced by the parties during discovery in this proceeding. With the exception of Exhibit 14, all such documents have been marked as exhibits during the course of pre-trial depositions.

Thomas C. Morrison

Sworn to before me this 13th day of November, 1975.

Helen A Strader

Notary Public

HELEN A. STRADER
NOTARY PUBLIC, State of New York
Qlfd. 41-4712370

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT 14- TWA RECEIPT DATED MARCH 30, 1973

97a

TWA MARKETAIR NEXT FLIGHT OUT

015 0160 8552

DECLARED VALUE (NOT TO EXCEED $500)
$

SHIPPER: F. WIEDERSUM ASSOC	CONSIGNEE: NAT'L HOME CONSTRUCTION
STREET & ENDING: 65 Roosevelt Ave	STREET ADDRESS: EARL AVE AT WALLACE
CITY: Valley Stream STA. ZIP CODE 11582	CITY: Charleston STATE ZIP CODE
ROUTING FROM: Lga FLIGHT NO.: 463 DATE: 3-30	TO (IF ESTIMATING): (N.Y.)
PIECES (ONE ONLY) DESCRIPTION (INCLUDING METHOD OF PACKING, MARKS AND NUMBERS): William H. Wiedersum	WGT. IN LBS. (NOT TO EXCEED 50):
INSTRUCTIONS TO CARRIER	
TELEPHONE ON ARRIVAL NO.	EXECUTED AT (CITY): Dell 8:20 TIME: Elfin

CHARGE: 20.

TAX: 1

TOTAL: 21.00

CASH

CREDIT ☐

ACCOUNT NO: 5-21-03

National Homes
Naval Housing, Charleston, South Carolina.

1 — SHIPPER'S RECEIPT

AC-1-A (9-72)
PRINTED IN U.S.A.

EXHIBIT 15- LETTER DATED MARCH 30, 1973 FROM WILLIAM G. LAVERTY TO ORVILLE DULEY

March 30, 1973

National Homes Construction Corp.
Earl Avenue at Wallace
Lafayette, Indiana 47902

Attention: Mr. Orville Duley

Gentlemen:

Enclosed are the Bid documents for the Naval Housing project at Charleston, South Carolina.

Very truly yours,

WILLIAM G. LAVERTY
Business Development
jcw

EXHIBIT 16- MEMORANDUM DATED MARCH 30, 1973 OF WILLIAM G. LAVERTY

MARCH 30, 1973

MEMORANDUM

TO: NJW____
FGW____
RCW____
LJS____
AHV____

RE: NATIONAL HOMES

Today, I put the final plans for the Navy Housing project at Charleston, South Carolina, on a plane and sent them directly to National Homes' home office.

I called earlier and told Mr. Duley that the plans would go on the above day and he said he would have someone there to pick up the plans. I later called to confirm that the plans were on their way.

This would give National Homes the six (6) days they said they needed to complete their final bid proposal. We will send eight (8) complete sets before April 6, the deadline. According to Floyd Payne, National plans to fly the package to Charleston on the 6th and personally deliver their proposal.

Presently, finishing touches are being done on the plans, such as titles, etc.

William G. Laverty

WILLIAM G. LAVERTY
lf

EXHIBIT 19- LETTER DATED APRIL 4, 1973 FROM WILLIAM G. LAVERTY TO FLOYD PAYNE

April 4, 1973

Mr. Floyd Payne
National Homes Construction Corp.
P.O. Box 860
Earl Avenue at Wallace
Lafayette, Indiana 47902

Re: Navy Housing Project at the Naval Weapons Station
Charleston, South Carolina

Dear Floyd:

Enclosed are the eight (8) sets of completed Architectural-Engineering Drawings required for submission of our joint proposal for the 200 Family Housing Project in Charleston, South Carolina.

Thank you for your cooperation and good luck with your proposal.

Very truly yours,

WILLIAM G. LAVERTY
Business Development
jcw

Encls. (8)

DEF. EX. Q
FOR ID. 4-16-79
HARLEY B. KRAMER

EXHIBIT 20- TWA RECEIPT DATED APRIL 5, 1973.

TWA MARKETAIR NEXT FLIGHT OUT

015 0179 2276

DECLARED VALUE (NOT TO EXCEED $500)
$ 200.00

SHIPPER: Frederic P. Wiedeman Assc
STREET ADDRESS: 65 Roosevelt Ave
CITY: Valley Stream STATE: N.Y. ZIP CODE:
ROUTING FROM: LGA FLIGHT NO.: 463

CONSIGNEE: Mr. Floyd Payne, NATIONAL HOMES CONSTRUCTION CORP
STREET ADDRESS: P.O. Box 560, Earl Ave at Wallace
CITY: LAFAYETTE STATE: IND ZIP CODE: 47902
DATE: 4/5
TO (DESTINATION): IND

PIECE (ONE ONLY) DESCRIPTION (INCLUDING METHOD OF PACKING, MARKS AND NUMBERS) — WGT. IN LBS. (NOT TO EXCEED 50)

INSTRUCTIONS TO CARRIER

TELEPHONE ON ARRIVAL NO.:
EXECUTED AT (CITY): Lafayette DATE: 4/5 TIME: 12 30

CHARGE: 20 —
TAX: 1 —
TOTAL: 21 —
CASH ☒
CREDIT ☐
ACCOUNT NO.

1 — SHIPPER'S RECEIPT

AC-1-A (9-70)
PRINTED IN U.S.A.

Called Floyds office. To confirm that plans were on their way. National would be there To put up plans On April 6 they will fly plans & proposal To South Carolina.

WCL

101a

AFFIDAVIT OF ALBERT H. VOORNEVELD SWORN TO NOVEMBER 14, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, :

- against - : AFFIDAVIT

NATIONAL HOMES CONSTRUCTION CORPORATION, : 74 Civ. 823 (WB)

Defendant. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

ALBERT H. VOORNEVELD, being duly sworn, hereby deposes and says:

I am an architectural administrator for Frederic P. Wiedersum Associates, the plaintiff in this action. I was in charge of Wiedersum's involvement in the military housing project at the Naval Weapons Station, Charleston, South Carolina and am familiar with the facts and circumstances regarding our collaboration with National Homes on this project.

On February 26, 1973, approximately a week after the pre-proposal conference, I met with Mr. John Gleason of National Homes at our offices in Valley Stream, Long Island. Mr. Gleason and I discussed the plans and specifications which the Navy had issued for this project and the developments and observations made by National at the pre-proposal conference. Both Mr.

Gleason and I were optimistic about our chances of being the successful bidder on this project. This optimism was due to the fact that our proposal had come in second on the recent Warminster, Pennsylvania project and we had recently engaged in discussions with the Naval authorities and with National Homes regarding steps which could be taken to improve any future proposals.

At this meeting Mr. Gleason and I agreed that we would proceed with the preparation and submission of a bid on the South Carolina project. In fact, when the meeting ended Mr. Gleason said, in substance, "lets go get this one." This meeting is the meeting which I referred to in my deposition at pages 15-16; at that time, however, I had not reviewed my 1973 calendar and was unable to recall the exact date of the meeting.

Albert H. Voorneveld

Sworn to before me this
14th day of November, 1975.

Notary Public

ALLEN E. FENNELL
NOTARY PUBLIC, State of New York
No. 30-1193525
Qualified in Nassau County
Commission Expires March 30, 1977

AFFIDAVIT OF ARVIL DULEY SWORN TO NOVEMBER 18, 1975

104a

1948a

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against-

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant.

REPLY AFFIDAVIT

74 Civ. 823 (WB)

- -x

STATE OF NEBRASKA)
:
COUNTY OF DOUGLAS)

ARVIL DULEY, being duly sworn, says:

1. I am an Assistant Secretary of defendant and have knowledge of the facts hereinafter stated and make this reply affidavit in support of defendant's motion for summary judgment.

2. At my deposition on February 28, 1975, I was shown what was identified as defendant's Exhibit P, which was a copy of a letter dated March 30, 1973, addressed to me from William Laverty of plaintiff's office. The letter indicated that bid documents for the South Carolina Project were enclosed. I testified that the documents which I received with the letter were forms prepared by the Navy and supplied to potential bidders to fill in information required to be submitted as part of a proposal; they were not plans prepared by plaintiff.

3. Since I was familiar with the forms required by the Navy, having put together the proposal for a previous project, I was asked by John Gleason, who was in charge of

the South Carolina Project at our office, to collect the necessary forms. I reviewed the forms and then compared them against the Navy's Specifications for the South Carolina Project to make sure that all of the forms were included.

4. My clear recollection of what I received with the Laverty letter of March 30 was confirmed when plaintiff subsequently served a set of interrogatories, one of which required that all documents enclosed with the Laverty letter of March 30 be identified. In our efforts to answer the interrogatory, we located a folder which contained (1) the original of Mr. Laverty's letter of March 30 with a stamp indicating that it was received at our office on April 2, 1974, (a copy of which is annexed hereto as Exhibit A) (2) the bid documents consisting of the forms supplied by the Navy (copies of which are annexed hereto as Exhibit B) and (3) two copies of the Navy's specifications for the South Carolina Project which I used to check whether the packet of bid documents was complete.

5. I am well aware of what final plans look like and such plans were not received by me.

Arvil Duley

Sworn to before me this
18th day of November, 1975.

GENERAL NOTARY State of Louisiana

EXHIBIT A - LETTER DATED MARCH 30, 1973 FROM WILLIAM G. LAVERTY TO ORVILLE DULEY ANNEXED TO FOREGOING AFFIDAVIT

FREDERIC P. WIEDERSUM ASSOCIATES
ARCHITECTS - ENGINEERS

VALLEY STREAM, NEW YORK • TOTOWA, NEW JERSEY

NORMAN J. WIEDERSUM RA
FREDERIC G. WIEDERSUM PE

APR 02 1973

March 30, 1973

National Homes Construction Corp.
Earl Avenue at Wallace
Lafayette, Indiana 47902

Attention: Mr. Orville Duley

Gentlemen:

Enclosed are the Bid documents for the Naval Housing project at Charleston, South Carolina.

Very truly yours,

William G. Laverty

WILLIAM G. LAVERTY
Business Development
jcw

AFFIDAVIT OF WILLIAM G. LAVERTY SWORN TO NOVEMBER 19, 1975 11/20/ 107a

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against-

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant.

AFFIDAVIT

74 Civ. 823 (WB)

State of New York)
: ss.:
County of Nassau)

WILLIAM G. LAVERTY, being duly sworn, hereby deposes and says:

I am employed by Frederic P. Wiedersum Associates, the plaintiff in this action. I was involved in liaison between our firm and National Homes Construction Corp. in connection with the military housing project at the Naval Weapons Station, Charleston, South Carolina.

On March 30, 1973, I forwarded to Mr. Arvil Duley of National Homes the final plans which had been prepared by our firm on this project. These plans consisted of 20 separate drawings and were forwarded along with various other contract documents under cover of my letter of March 30, 1973. On that same day I prepared a memorandum to the file reciting the above facts. That memorandum is the document which is submitted as Plaintiff's Exhibit 16 in opposition to defendant's motion for summary judgment.

William G. Laverty

Sworn to before me this
19th day of November, 1975.

ALLEN F. FENNELL

19482

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, :

-against- :

No. 74 C 823

NATIONAL HOMES CONSTRUCTION CORPORATION, :

November 21,1975

Defendant. :

- -x

Appearances:

ROGERS & WELLS, ESQS
Attorneys for Plaintiff

MILBANK, TWEED, HADLEY & McCLOY, ESQS
Attorneys for Defendant

MEMORANDUM AND ORDER

BRUCHHAUSEN, D. J.

The defendant moves for an order, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment in its favor.

This is an action for breach of contract. The defendant has substantially denied the allegations, contained within the complaint.

It is well settled that on a motion for summary judgment, the court cannot try issues of fact; it can only determine whether there are issues to be tried. American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 279 (Cir. 2, 1967); Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (Cir. 2, 1971). Furthermore, a court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, United States v. Diebold, Inc., 369 U.S. 654,655. The movant must clearly show the absence of any material fact in dispute, Adickes v. Kress & Co., 398 U.S. 144, 157(1970). Heyman v. Commerce and Industry Insurance Company, decided October 24, 1975, (Cir. 2), docket No. 75-7230.

In the case at bar, numerous affidavits and exhibits have been submitted in support of the respective positions of the parties. A reading thereof clearly raises the question among others of whether an agreement did in fact exist or whether the conduct of the parties through correspondence established a contract. This

is sufficient to raise a substantial question to be decided by the trier of the facts.

The court concludes that the documents submitted raise substantial issues of fact, and must resolve all ambiguities and disagreements in favor of the party against whom summary judgment is sought, United States v. Diebold, Inc., supra.

The motion is denied without costs.

It is so ordered.

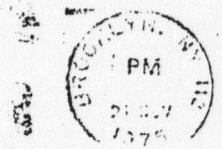
Copies hereof will be forwarded to the attorneys for the parties.

/s/ WALTER BRUCHHAUSEN

Senior U. S. D. J.

CHAMBERS OF WALTER BRUCHHAUSEN
UNITED STATES DISTRICT JUDGE
U. S. COURTHOUSE
BROOKLYN, NEW YORK 11201

OFFICIAL BUSINESS



Milbank, Tweed, Hadley & McCloy, Esqs
1 Chase Manhattan Plaza
New York, N.Y. 10005

mmwdf

1116

OFFICE COPY

DEFENDANT'S TRIAL MEMORANDUM

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FREDERIC P. WIEDERSUM ASSOCIATES, Plaintiff, -against- NATIONAL HOMES CONSTRUCTION CORPORATION, Defendant.	:	74 Civ. 823 (WB)

TRIAL MEMORANDUM OF DEFENDANT

Of Counsel:

Russell E. Brooks
Harry L. Simmons

MILBANK, TWEED, HADLEY & McCLOY
1 CHASE MANHATTAN PLAZA
NEW YORK, N. Y. 10005

212-422-2660

Attorneys for defendant
National Homes Construction Corporation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, :

-against- : 74 Civ. 823 (WB)

NATIONAL HOMES CONSTRUCTION CORPORATION, :

Defendant. :

- -x

TRIAL MEMORANDUM OF DEFENDANT

Preliminary Statement

Plaintiff is an architectural firm and defendant is a construction firm. Plaintiff sues for damages allegedly resulting from the fact that defendant did not submit a bid and proposal to the Department of the Navy for the construction of a multiunit housing project.

The complaint sets forth five causes of action. It is alleged that plaintiff and defendant had entered into a written contract on March 29, 1971, whereby plaintiff agreed to design student housing which defendant agreed to construct in the event that a contract was awarded by

the New Jersey Educational Facilities Authority (the "New Jersey Project"). It is further alleged that in January 1973, plaintiff and defendant agreed to submit a bid on a 200 unit housing project at the Naval Weapons Station, Charleston, South Carolina, to be constructed for the Department of the Navy (the "South Carolina Project"). It is claimed that in connection with the South Carolina Project the parties agreed to be bound by the terms of their agreement for the New Jersey Project and that defendant failed to submit a bid that it was obligated to submit, after representing to plaintiff that it would do so. Plaintiff had informed defendant that its fee would be $250,000 in the event that a contract was awarded. Plaintiff claims that defendant's misrepresentation and breach of agreement damaged plaintiff in the amount of $250,000.

The second cause of action adds the allegation that plaintiff expended time, labor and expense in preparing plans for the South Carolina Project at defendant's request and is entitled to recover the reasonable value of its services, $250,000.

The Complaint contains three additional causes of action. However, the marked pleadings submitted to the Court with the covering letter of plaintiff's counsel dated December 3, 1975 represent that plaintiff will proceed solely on the first and second causes of action -- contract and promissory estoppel.

THE EVIDENCE WILL SHOW:

In Summary

From late January through March 1973, plaintiff and defendant worked together to investigate the possibility of submitting a proposal for the South Carolina Project. Floyd Payne of defendant's office informed plaintiff that the final plans had to be in defendant's hands at least six to eight days prior to the date for the submission of the proposal which was due on April 6, 1973.

The final plans were not received from plaintiff by defendant until April 5. On that date, defendant determined that no bid could be made for two reasons. First, defendant had not had the plans in sufficient time to verify what its construction costs would be. Second, the plans were deficient in so many substantial respects that defendant would have been unable to submit a responsible bid even had those plans arrived eight days prior to April 6.

Various of defendant's employees assumed that others had informed plaintiff of the decision not to bid and, as a result, plaintiff did not learn of the decision not to submit a proposal until sometime later. Since the decision was made shortly before the date for submission of proposals, plaintiff was in no way injured by defendant's failure to give prompt notice that it would be unable to submit a proposal.

In Detail

The South Carolina Project was brought to defendant's attention by a letter from William Laverty of plaintiff's office dated January 23, 1973 to John Gleason, then a Vice President with defendant. The letter in relevant part reads as follows:

> "We are interested in submitting a proposal along with National Homes for the construction of 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina. The specifications and other detailed information are being sent to our office and I will forward a copy to your office.
>
> "If we employ the methods we discussed in our office on December 20, 1972, we should both be able to get this proposal out at minimum cost."

John Gleason responded by a letter dated January 29, 1973 which read in relevant part as follows:

> "This is in answer to your letter of January 23 concerning 200 Family Housing Units at the Naval Weapons Station, Charleston, South Carolina. National looks forward to the opportunity of submitting a proposal along with Frederic P. Wiedersum Associates on this Project."

The procedure followed by the Navy in seeking proposals for the South Carolina Project was similar to that followed in respect to other projects involving a public authority or the military on which plaintiff and defendant had worked together in the past. After the Navy sent out an invitation to submit proposals along with its specifications

for the construction, a pre-proposal conference was held for potential bidders. The purpose of the conference was to give the potential bidders an opportunity to view the construction site and to obtain additional information and a better understanding of what was expected. 117a

The pre-proposal conference for the South Carolina Project was held on February 20, 1973, and the date on which proposals were to be submitted was April 6, 1973. In order to put in a proposal, it was necessary during that period for plaintiff to draft preliminary architectural and site plans and for defendant as the construction firm to review them to make certain that they fitted the specifications of the Navy and that the facility designed was one which defendant was capable of constructing. Changes in the preliminary plans had to be incorporated into final plans which defendant would then use to obtain final commitments from subcontractors. Once the final bids from subcontractors were in, defendant would calculate the various costs and prepare the amount of its bid. Great care and precision had to be employed in determining the amount at which defendant would bid to insure that defendant did not become obligated to construct the project at a loss. Once an award was made on such a bid, defendant would have been obligated to perform or forfeit the required performance bond.

Shortly after the pre-proposal conference, a

meeting was held in plaintiff's office in New York at which John Gleason and Floyd Payne were present. The purpose of the meeting was to discuss what had transpired at the pre-proposal conference, since plaintiff did not have a representative present at the conference, and to discuss how the parties might start to work on those matters that were required if a proposal was to be submitted. The discussion concerned the drafting of preliminary plans and how defendant might aid plaintiff on that task. Neither John Gleason nor Floyd Payne represented or agreed that defendant would submit a proposal based on any plans that plaintiff drafted without regard to their sufficiency. Nor did plaintiff mention that such a commitment was required as a precondition to it starting to work. Under no circumstances would defendant or any other construction firm agree to put in a proposal on a project prior to having an opportunity to carefully examine the final plans and gather other relevant information such as cost data. Without having an opportunity to even examine the preliminary plans, defendant would have no way of knowing whether the facility being designed was one that it could build or whether it could find interested subcontractors. Submission of a bid on the basis of final plans which were not carefully reviewed by the builder could have resulted in an error slipping by undetected with disastrous consequences for defendant.

For a project the size of the South Carolina Project, at least 60 days should have been allowed by the Navy between the pre-proposal conference and the date for submission of proposals in order to allow sufficient time to do all of the required work. The time allowed was approximately 45 days; so plaintiff and defendant started under severe time restrictions.

In order to have afforded defendant sufficient time to review the final plans and to obtain reconfirmations from subcontractors, the final plans should have been in defendant's hand from 8 to 10 days prior to the date specified for submission of proposals (April 6). The minimum amount of time needed was 6 to 8 days, and Floyd Payne personally informed William Laverty of plaintiff's office of that fact. It would require 2 to 3 days to check the final plans against the preliminary plans, and 4 to 5 days to get the subcontractors to reconfirm their bids. Of course, there was no guaranty that everything could be done in 6 to 8 days, but to do the job properly at least that much time was required.

In late March 1973, Arvil Duley, one of defendant's employees, was asked by John Gleason to collect the necessary forms prepared by the Navy and supplied to potential bidders to submit information required as part of a proposal. Those forms had been previously sent to plaintiff by the Navy. Arvil Duley had not previously been involved with the South Carolina Project and was only called in to collect the

necessary forms prepared by the Navy and supplied to potential bidders to submit information as part of a proposal. Those forms had been previously sent to plaintiff by the Navy. Because of his previous experience in putting together a proposal on the Warminster project for the Navy, on which plaintiff and defendant had earlier worked together, Arvil Duley was familiar with the necessary bidding forms. He called plaintiff's office and asked that the bid documents be sent to him. These bid documents arrived by letter from William Laverty dated March 30, 1973, which read "Enclosed are the Bid documents for the Naval Housing project at Charleston, South Carolina". Arvil Duley never received the final plans which defendant needed in order to complete its work.

Eight sets of final plans did arrive on April 5, 1973 with a letter from plaintiff dated April 4. This was much too late to gather the necessary cost data. Subsequent review of these plans by defendant revealed that even had they been received eight or ten days prior to April 6, they contained so many deficiencies that no responsible bid could have been submitted without substantial

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revision of the plans. For instance, net area shown on the plans exceeded the net area prescribed in the Navy's criteria by approximately 15%. The floor plans for the units were not complete. Some side elevation plans did not match floor plans. No foundation sections were shown for each type of building. No street sizes or other details were given.

After the decision was made to not put in a proposal, various of defendant's employees assumed that others had or would relay to plaintiff the fact that a proposal was not being submitted. However, no one from defendant's office did inform plaintiff and therefore plaintiff did not discover until some months later that a proposal had not been submitted.

It was at all times understood by plaintiff and defendant that any expenses that either one incurred in connection with working on a proposal would be borne by that party and there would be no reimbursement from the other. Shortly before the South Carolina Project arose, plaintiff and defendant met in New York to discuss how they might approach other projects similar to the South Carolina Project they thought might arise in the future. At that meeting, the subject of reimbursement again arose and plaintiff was told that defendant would not agree to reimburse it and any expenses incurred in connection with drafting plans for future projects would be borne by plaintiff. Neither party would receive anything unless a successful proposal was submitted.

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At one time plaintiff and defendant did have a written contract dated March 29, 1971 concerning the New Jersey Project. The contract related solely to the New Jersey Project and was not involved in any way with the South Carolina Project. Even if the dealings between plaintiff and defendant in connection with the South Carolina Project had been governed by the terms of the contract for the New Jersey Project there still would not have been a duty on defendant's part to submit a proposal.

Paragraph 6b of the contract read as follows:

> "Submission of Bid. National will submit a bid in an amount computed in accordance with Paragraph 5 of this agreement on any proposal on which Wiedersum and National agree that National should bid. National and Wiedersum agree to indemnify each other against any damages, losses and liabilities arising out of their own acts, or negligence in the performance of this agreement." (emphasis added)

The contract for the New Jersey Project also clearly sets forth in paragraph 4 that each party was to bear its own expense for any work in putting together a proposal. According to paragraph 8 of the contract, plaintiff would not receive anything unless the proposal was successful and a construction contract awarded.

The New Jersey Project covered a number of construction jobs that were being bid for separately. In some cases plaintiff and defendant put in a proposal and in other cases they did not.

The contract for the New Jersey Project calls for an agreement at some point after work on plans as to whether a bid was to be submitted. No such agreement was ever reached nor was any promise made in connection with the South Carolina Project.

I

DEFENDANT BREACHED NO CONTRACTUAL DUTY TO PLAINTIFF

It is conceded that plaintiff and defendant wanted to submit a successful proposal for the South Carolina Project and that both parties worked hard and incurred significant expenses in an effort to do so. The fact is that a decision was made not to submit a proposal because defendant had not received final plans from plaintiff in sufficient time to enable it to do the necessary work to prepare and submit a proposal and because the final plans, when received, were materially deficient. In its contract claim, plaintiff has the burden of establishing by a ponderance of the evidence (1) that defendant did in fact receive final plans in submittable form sufficiently ahead of time and (2) that defendant had a contractual duty to submit a proposal which it breached.

On the first issue, the testimony of defendant's employees will show that they anxiously awaited the arrival of the final plans so that they could start the necessary work of reviewing them and obtaining final commitments from

subcontractors in an effort to submit a proposal. Although 124a
defendant would have wished for more time, it was willing to attempt the task of putting together a proposal in what it considered to be the minimum time required, which was 6 to 8 days.

Defendant had no motive to work on a proposal and then merely sit on the necessary plans, if they had arrived. Defendant was in business to win construction contracts and that could only be done by submitting winning proposals. Even without the unequivocal testimony of defendant's employees that they waited in vain for the plans, that by itself is convincing evidence that the plans did not arrive in time.

It is not possible for defendant to explain why the plans did not arrive, it can only state that it did not receive them. However, defendant does not have the burden of making such an explanation. It is plaintiff's task to establish by a preponderance of the evidence that the plans were received by defendant and that they were in good form and capable of being submitted as part of a proposal.

Plaintiff's feeble effort in the direction of establishing its burden is the statement of William Laverty that he sent the plans to defendant with a letter dated March 30, 1973 to the attention of Arvil Duley. Yet, the

text of the letter and the circumstances surrounding it indicate that plaintiff's burden has indeed not been shouldered. The letter refers to the fact that "Bid documents" for the South Carolina Project were enclosed. Arvil Duley stated that his only involvement with the South Carolina Project was to collect bid documents which were the forms supplied by the Navy on which the proposal information was to be filled in. He had been asked to do so because he was familiar with the Navy's bid documents from his work on the Warminster Project. The fact that the letter was addressed to Arvil Duley, when combined with the fact that the letter refers to bid documents, would seem to indicate that bid documents and not plans were enclosed. Why else would the letter have been sent to Arvil Duley who had only become involved for the limited purpose of collecting bid documents.

Add the additional fact that Arvil Duley states that he received bid documents and not plans. Add the further fact that when William Laverty sent final plans on April 4, 1973, they were enclosed with a letter that referred to final plans and not bid documents. That letter read in relevant part as follows:

> "Enclosed are the eight (8) sets of completed Architectural-Engineering Drawings required for submission of our joint proposal for the 200 Family Housing Project in Charleston, South Carolina."

The emerging picture is clear: bid documents and not plans were sent with the March 30 letter.

Defendant's liability in this case cannot depend, without more, on when final plans were received, although establishing receipt of plans is an essential element of plaintiff's claim. The more that must be shown is a duty to have submitted a proposal based on plans submitted by plaintiff. That duty, according to plaintiff has its genesis in contract. A contract is a promise or set of promises given in exchange for promises or acts of another party. Restatement of Contracts (Second) § 1 (Tentative Drafts Nos. 1-7 1973). Section 2 of the Restatement of Contracts (Second) defines a promise as follows:

> "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."

Since it is plaintiff's claim that defendant was contractually bound to submit a proposal based on any plans that it might draft, it must show an intent by defendant to be so bound. However, the facts offer plaintiff no support in this respect and its claim that defendant made such a commitment is based on reasoning that is strained in the extreme. It claims in its trial memorandum (at p. 8) that John Gleason's letter of January 29, 1973 stating that

defendant looked forward to the opportunity of submitting a proposal with plaintiff "clearly establishes an agreement between the parties to collaborate on the preparation and submission of a bid for the South Carolina Project". To argue that the Gleason letter establishes a commitment to collaborate with plaintiff on the South Carolina Project is stretching. To argue that the letter is a promise that defendant will submit a proposal based on any plans that plaintiff might draft without regard to defendant's view of their insufficiency is absurd, especially in light of the testimony plaintiff's own witnesses that it was not possible for either party to determine whether it was interested in proceeding until after the pre-proposal conference which was held on February 20, 1973.

The other evidence that plaintiff asserts in its trial memorandum that it will offer in support of its contract claim are the subsequent conduct of the parties (at p. 10) and their prior collaboration on other projects (at p. 7). Obviously plaintiff is attempting to so stir up the facts so that this Court or a jury might in confusion be led to find in its favor. Since plaintiff contends that it would not have drafted plans if it had thought there was a chance that a proposal might not be submitted, the agreement referred to (to submit a bid regardless of the timeliness or

quality of the plans) must have been reached prior to plaintiff's commencing work on preliminary plans. Any evidence concerning the subsequent conduct of the parties after plaintiff started to work on drafting preliminary plans would therefore be irrelevant to establish whether there was a contract that defendant would submit a proposal.

If a contract existed, it must have been entered into at the time plaintiff started work. The issue then is whether prior to plaintiff commencing work on preliminary plans, the words or acts the defendant manifested an intention on its part to submit a proposal based on anything plaintiff might submit in the form of plans. Certainly, no such intent is shown by any facts in this case. Of course, defendant hoped that a successful proposal could be developed, if it though otherwise it would not have spent one second working on the project. However, an expectation or a hope does not give rise to a contractual duty.

Prior to reaching the stage where a decision could be made as to whether to submit a proposal, numerous problems had to be resolved. Plaintiff's design had to be compatible with defendant's construction methods and standards so as to be a facility that defendant was capable of constructing. Also, the facility designed had to be in accordance with the standards of the Navy. Since defendant and not plaintiff

was submitting the bid, it was defendant who would have been responsible for the safety and sufficiency of the final construction. Further, once a proposal had been submitted, defendant would have been bound to do the construction at the price submitted in the proposal. If defendant had not taken sufficient time to assure itself that it could in fact complete the construction at the price indicated, it would have been responsible for any additional costs. Plaintiff would have received its fee and would not have had any responsibility for the additional costs. This is the factual background against which the words and acts of defendant must be viewed in determining whether there was a manifestation of intent on defendant's part to submit a proposal based on anything that plaintiff might submit under the label of "final plans". 129a

In addition, there was no way of determining until plaintiff's work was well under way that needed material could be obtained at a price that would enable defendant to put in a competitive proposal. Assume that a review of plans and discussion with subcontractors had shown that a proposal could only be submitted in an amount in excess of the maximum amount provided for by the Navy to be available. Under plaintiff's theory, defendant would still have been obligated to spend additional time pursuing a futile undertaking.

Defendant's words and acts prior to the start of work on the project show nothing more than a willingness to work with plaintiff towards a goal that both parties hoped could be achieved. It was known that expenses would be incurred by both sides in connection with the work to be done, but if the effort were successful both parties stood to make a profit.

The words and conduct of the parties subsequent to the start of work on the preliminary plans, which plaintiff claims show an intent by defendant to be bound to submit a proposal, show nothing of the kind. The only thing shown is that plaintiff and defendant were working diligently in an attempt to win a construction contract. It is true that the parties met to discuss what had to be done. John Gleason may well have said, "let's go get this one" (Plaintiff's trial memo p. 11). One would not have expected him to say otherwise. The evidence concerning the subsequent conduct shows that everyone was working extremely hard, but that much is conceded. The evidence certainly does not show that it was defendant's intention to commit itself to put in a bid without regard to the sufficiency of the plan submitted.

Similarly, the claim that the prior collaboration of the parties on prior projects shows a commitment to

submit a proposal is also without substance. On the contrary, 1310
the evidence shows just the opposite, namely that the parties contemplated working on plans for the New Jersey Project and then a decision whether to submit a proposal. The contract provides for what is referred to as a "design phase" during which plaintiff would draft plans and then a "bid phase" during which the parties would decide whether a proposal was to be submitted. As to the bid phase, the contract provided as follows:

> "Submission of Bid
>
> National will submit a bid in an amount computed in accordance with Paragraph 5 of this agreement on any proposal on which Wiedersum and National agree that National should bid." (Emphasis added)

Clearly the contract for the New Jersey Project was an agreement to agree and imposed no obligation on defendant to submit a proposal. May Metropolitan Corp. v. May Oil Burner Corp., 290 N.Y. 260 (1943); DeVecchi v. DeVecchi, 34 App.Div. 2d 790 (2d Dep't, 1970); Alderman v. Central New York Arterial Markets, Inc., 24 App.Div. 2d 1046 (3rd Dep't, 1965). In May Metropolitan Corp. v. May Oil Burner Corp., supra, the New York Court of Appeals said:

> "A contract is incomplete and unenforceable when, as to some essential term, there has been no agreement but only an agreement to agree in

> the future. (St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 235 N.Y. 30, Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., 235 N.Y. 338). * * * If the contract contains, as to some material term, an 'agreement to agree' and it fairly appears that what the parties intended was that the treaty should be binding only if the parties did thereafter in fact arrive at a mutually satisfactory agreement as to that term, then unless and until they arrive at that point, there is no contract." (290 N.Y. at 264)

Obviously the intent of plaintiff and defendant in connection with the New Jersey Project was that, if and when a proposal was submitted, it would be on behalf of both parties and they could not enter into a similar agreement for the New Jersey Project with either another construction firm or another architectural firm. The contract most certainly did not impose on defendant an obligation to submit a proposal that included plans that it felt it did not have sufficient time to review, or were deficient.

The fact that the parties worked on other projects adds nothing on the question of whether there was a contractual duty on defendant's part to submit a proposal in the present case. Indeed, the facts concerning the other projects show nothing more than the fact that the parties worked together and submitted a bid for the Warminster Project and did nothing more than briefly consider the New London Project.

The only other point that need be made concerning plaintiff's contract claim relates to its own actions.

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Plaintiff claims that it would not have started work on the South Carolina Project if it thought that there was a chance that a proposal might not be submitted. Yet, at no point was such a precondition to plaintiff's participation in the South Carolina Project ever relayed to defendant. Indeed, at no point in their collaboration with respect to previous projects had any such precondition been raised. To make such a contention in connection with the New Jersey Project would fly in the face of specific contract language to the contrary.

If plaintiff wanted a precondition to its participation in the South Carolina Project, it could not keep that desire to itself. As the Court said in Porter v. Commercial Cas. Ins. Co., 292 N.Y. 176 (1944):

> "In some branches of the law, especially in the criminal law, a person's secret intent is important, but in the formation of contracts it was long ago settled that secret intent was immaterial, only overt acts being considered in the determination of such mutual assent as that branch of the law requires." (292 N.Y. at 184)

It is words and acts that control. Plaintiff's words and acts completely show that its claim that it would not have started to work if defendant could decide not to submit a proposal is an afterthought. The fact is that both parties realized that the task of putting together a successful proposal was a difficult one and that the effort might have to be aborted at any time up to the actual submission of the proposal.

II

PLAINTIFF DOES NOT HAVE A
CLAIM FOR PROMISSORY ESTOPPEL

Plaintiff labels its second cause of action as one based on promissory estoppel. It contends that even if it should be found that there was no agreement that a proposal would actually be submitted, it could be found that defendant's conduct led plaintiff to believe that a proposal would be submitted and plaintiff relied to its detriment. Not only does the contention find no support from the facts, but the cases cited by plaintiff show that it has no claim based on promissory estoppel as a matter of law.

One of the cases cited by plaintiff to illustrate that the New York courts have accepted the doctrine of promissory estoppel, as set forth in Section 90 of the Restatement of Contracts (Second), is Bethlehem Fabricators, Inc. v. British Overseas Airways Corp., 434 F.2d 840 (2d Cir. 1970). The Court there said the following:

> "Although the defendant claims that gratuitous promises inducing detrimental reliance have not been enforced in New York except in charitable subscription cases, this is not strictly true in the light of New York cases imposing liability on those who promise that there will be insurance and fail to fulfill that promise, Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923); cf. International Products Co. v. Erie R. Co. 244 N.Y. 331, 155 N.E. 662 (1927); Bush Terminal Co. v. Globe & Rutgers Fire Ins. Co., 182

> App.Div. 748, 169 N.Y.S. 734 (1st Dept. 1918), aff'd 228 N.Y. 575, 127 N.E. 909 (1920), or who let insurance lapse, Spiegel v. Metropolitan Life Ins. Co., 6 N.Y.2d 91, 188 N.Y.S.2d 486, 160 N.E.2d 40 (1959). Since the consequences for Bethlehem of its reliance on BOAC's promise to require a payment bond were potentially as severe as were the consequences in the insurance cases, there is no persuasive reason for distinguishing those cases." (434 F.2d at 844)

The other cases cited by plaintiff were all insurance cases to which the Court in Bethlehem indicated the doctrine had been restricted.

The reason for restricting the doctrine of promissory estoppel to charitable subscriptions and insurance cases is readily apparent. There is no requirement that there be consideration given in return for the promise. See, Restatement of Contracts (Second), § 90; James Baird Co. v. Gimbel Brothers, 64 F.2d 344 (2d Cir. 1933). If not kept within bounds, the doctrine would render meaningless the other elements of a breach of contract claim. It is applied according to Section 90 of the Restatement when "injustice can be avoided only by enforcement of the promise."

In the usual insurance case involving promissory estoppel, a promise is made that insurance will be obtained. When the promise is breached and merchandise is destroyed, the injustice of allowing the promisor to escape without

any responsibility is clear. It should not be applied in an ordinary commercial or construction case, such as the present case, as an alternative for a plaintiff who cannot establish a breach of contract.

Even if promissory estoppel were applied in the present case, the facts would not allow recovery. An excellent statement of the elements of promissory estoppel is found in Ted Spangenberg Co. v. Peoples Natural Gas, 305 F.Supp. 1129 (S.D. Iowa 1969), aff'd 439 F.2d 1260 (8th Cir. 1971):

> "The elements most commonly associated with this theory are: (1) a clear and definite oral promise, (2) reasonable reliance by plaintiff on said promise, and (3) the weight of the equities clearly preponderates in favor of the plaintiff. See Miller v. Lawlor, supra [245 Iowa 1144, 66 N.W.2d 267 (1954)]; Shell Oil Co. v. Kelinson, supra [158 N.W.2d 724 (1968)]." (305 F.Supp. at 1133)

To merely state the elements is to show how clearly the facts in the present case do not support any claim for promissory estoppel. There was no promise to submit a bid and there would not have been in view of the practicalities. Plaintiff always knew there was a chance that the joint effort with defendant would have to be aborted short of submission of a bid. In any event, the plans plaintiff did submit as final plans on April 5 were too late and too deficient to enable any responsible builders to submit a bid.

III

PLAINTIFF CANNOT ESTABLISH ANY DAMAGES

Plaintiff claims that it is entitled to the reasonable and customary value of its services on the theory of quantum meruit or, in the alternative, to compensatory damages for time and expenses incurred in connection with the South Carolina Project.

Quantum meruit requires that the services be performed with the understanding by both parties that there is to be an obligation to pay for them. Shapira v. United Medical Service, Inc., 15 N.Y.2d 200 (1965); Grombach Productions, Inc. v. Waring, 293 N.Y. 609 (1944); Miller v. Schloss, 218 N.Y. 400 (1916); McGuire v. Hughes, 207 N.Y. 516 (1913).

In Miller v. Schloss, supra, the Court said:

> "A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which ex aequo et bono belongs to another. Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy." (218 N.Y. at 407)

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There can be no doubt that there was no understanding between plaintiff and defendant that any costs and expenses incurred by plaintiff would be reimbursed by defendant. Indeed, plaintiff has admitted that it was at all times understood that plaintiff was to bear its own costs in drafting plans to be included in any proposal that the parties contemplated submitting. A specific provision to that effect is found in the contract for the New Jersey Project.

Further, quantum meruit rests on the principle of unjust enrichment. For a defendant to be unjustly enriched, it is necessary for him to have received some benefit which he cannot in equity retain without making payment. Plaintiff, in drafting plans for the South Carolina Project, had no intention of benefiting defendant. Rather, it hoped that a successful proposal might be submitted for which it would receive a considerable fee. It was for plaintiff's own benefit, and not the benefit of defendant, that plaintiff drafted the plans.

Further, the cases cited by the plaintiff to support its claim of compensatory damage measured by the amount of costs and expenses that it incurred are clearly inapposite. In no case cited by plaintiff have the parties claiming expenses specifically agreed that the other party would have no liability for such expenses.

In the present case, defendant had been asked by plaintiff to bear some of plaintiff's costs in drawing up proposals. Plaintiff was told that it would have to bear its own expenses. Indeed, the only written contract between the parties provided that each would bear its own expenses in drawing up any proposals. In view of plaintiff's admissions that it knew it would receive no reimbursement from defendant, its claim for damages measured by the amount of those expenses is without merit.

Conclusion

Judgment should be entered in favor of defendant dismissing the action with costs.

Respectfully submitted,

December 8, 1975

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PLAINTIFF'S REQUEST FOR JURY INSTRUCTIONS

WIEDERSUM v. NATIONAL HOMES

PLAINTIFF'S REQUEST FOR
CHARGE NO. 1

Plaintiff's claim is a claim for breach of contract. Specifically, plaintiff claims as follows: (1) there was an agreement between the parties to prepare and submit a bid on the South Carolina project; (2) plaintiff performed its obligations under that agreement by delivering site and final design plans to defendant; (3) defendant breached its obligation by failing to submit a bid; and (4) plaintiff was damaged by virtue of its substantial investment of time and effort in the project, which it would not have incurred had plaintiff known that National would not submit a bid.

Since defendant admits that it did not submit a bid on the South Carolina project, you need only determine whether plaintiff has established, by a preponderance of the evidence, the remaining three facts, i.e. that there was an agreement to prepare and submit a bid, that plaintiff performed its obligation by making timely delivery of the final plans to defendant and that plaintiff was damaged by virtue of defendant's failure to submit a bid.

Given: _____

Refused: _____

Given as
Modified: _____

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WIEDERSUM v. NATIONAL HOMES

PLAINTIFF'S REQUEST FOR
CHARGE NO. 2

With regard to the first issue, the existence of an agreement: in order to find for the plaintiff you must find, by a preponderance of the evidence, that there was an agreement between the parties whereby they would work together to prepare and submit a bid on the South Carolina project. Plaintiff contends that such an agreement was established by three different events and circumstances. First, plaintiff claims that Mr. John Gleason's letter of January 29th to Mr. Laverty, in response to Mr. Laverty's letter of January 23rd, establishes such an agreement. Defendant denies that this letter was intended to establish such an agreement and claims, instead, that it merely indicated defendant's desire to investigate the possibility of preparing and submitting a bid on the South Carolina project. If you find, by a preponderance of the evidence, that this letter demonstrates defendant's intention to work with plaintiff in the preparation and submission of a bid on the South Carolina project, such a finding would satisfy the requirement that plaintiff prove the existence of an agreement.

Second, plaintiff claims that such an agreement was confirmed at the meeting between the parties on February 26th at plaintiff's offices in Valley Stream. Defendant denies that any such agreement was made at that meeting. In order to establish such an agreement, it is not necessary for the parties to have reduced their agreement to writing nor is it necessary that precise words, such as "we hereby agree to prepare and submit a bid on the South Carolina project" have been used. It is sufficient if you find that the substance of the parties' discussion at the February 26th meeting was that they would proceed to prepare and submit a bid on the South Carolina project. On the other hand, if you find that the parties agreed at this meeting merely to explore the possibility of submitting a bid on the South Carolina project, then the requisite agreement will not have been proven. If you find, by a preponderance of the evidence, that the parties did agree at this meeting that they would work together in the preparation and submission of a bid on the South Carolina project, such a finding would satisfy the requirement that plaintiff prove the existence of an agreement. In other words, this finding would satisfy the requirement of an agreement even if you found that the January 29th letter from Mr. Gleason to Mr. Laverty had not established such an agreement.

Given: _____

Refused: _____

Given as
Modified: _____

COPY

WIEDERSUM v. NATIONAL HOMES

PLAINTIFF'S REQUEST FOR
CHARGE NO. 3

Plaintiff also claims that an agreement to work together to prepare and submit a bid on the South Carolina project is confirmed by the conduct of the defendant during the time in question. Specifically, plaintiff claims that defendant's conduct from January 23rd through April 4th led plaintiff to believe that defendant would submit a bid on the South Carolina project and that plaintiff relied on that conduct to its detriment by doing all the work necessary to prepare final site and architectural plans for the project. The conduct of defendant which plaintiff claims led it to believe that defendant would submit a bid includes the following:

(1) Mr. Gleason's letter of January 29th.

(2) The meeting at plaintiff's office on February 26th, at which Mr. Gleason of National Homes allegedly said "Let's go get this one."

(3) The meeting at plaintiff's office on March 6th where Mr. Payne of National Homes reviewed and allegedly approved the site plans.

(4) The numerous telephone calls between plaintiff and defendant during February and March regarding the South Carolina project.

(5) The telephone call between Mr. Laverty and Mr. Payne of National Homes in late March wherein Mr. Payne stated that National needed the final plans six days before the bid deadline and wherein he also allegedly stated that National planned to fly the bid to Charleston on April 6th and personally deliver it to the Government.

(6) The telephone conversation on March 30th between Mr. Laverty and Mr. Duley of National Homes wherein Mr. Laverty allegedly told Mr. Duley that he was putting the final plans on a plane for delivery to defendant and wherein Mr. Duley allegedly agreed to have someone meet the plane and pick up the plans.

(7) Mr. Voorneveld's telephone call of April 2nd with John Gleason of National Homes, and his letter of April 3rd to Mr. Gleason, stating that if National was the successful bidder on the South Carolina project, Wiedersum's fee would be $250,000.

(8) The telephone call of April 5th between Mr. Laverty and Mr. Payne's office wherein Mr. Laverty confirmed that eight sets of the final plans were on their way to defendant and wherein defendant allegedly stated that they would pick up the plans and would fly the bid proposal to Charleston the following day.

If you find that this and/or other conduct by defendant reasonably led plaintiff to believe that defendant would submit a bid on the South Carolina project and that plaintiff relied on this conduct by doing all the work necessary to prepare final site and architectural plans for this project, such a finding would satisfy the requirement that plaintiff prove the existence of an agreement. In other words, this finding would satisfy the requirement of an agreement even if you found that neither the January 29th letter from Mr. Gleason to Mr. Laverty nor the meeting held on February 26th at plaintiff's offices had established such an agreement.

Given: _____

Refused: _____

Given as Modified: _____

Authority: Bethlehem Fabricators, Inc. v. British Overseas Airways Corp., 434 F.2d 840 (2d Cir. 1970); Spiegel v. Metropolitan Life Ins. Co., 6 N.Y.2d 91 (1959); Siegel v. Spear & Co., 234 N.Y. 479 (1923).

OFFICE COPY

WIEDERSUM v. NATIONAL HOMES

PLAINTIFF'S REQUEST FOR
CHARGE NO. 4

With regard to the second issue, whether Wiedersum fully performed its obligations under the Agreement: in order to find for plaintiff you must find, by a preponderance of the evidence, that Wiedersum delivered the final drawings to defendant in sufficient time for defendant to complete the final preparation of the bid proposal. In this respect, both sides agree that defendant told Wiedersum that it needed the drawings six days before the bidding deadline of April 6th. Plaintiff claims that it delivered the drawings to defendant via TWA air freight on March 30th; defendant denies that it received the drawings on that date and claims that all that was received were certain standard contract forms which were to be submitted as part of the final proposal. In support of its claim that the drawings were delivered to defendant on March 30th, Wiedersum cites the following evidence:

(1) Mr. Laverty's testimony that he forwarded the final drawings to defendant on March 30th under cover of his letter of that date to Mr. Duley.

(2) Mr. Laverty's testimony that he spoke with Mr. Duley by phone on March 30th and told him that he was sending the drawings to National by air freight and that Mr. Duley stated that National would meet the plane and pick up the plans.

(3) Mr. Laverty's signed memorandum of March 30th wherein he states that he put the final drawings on a plane on that date and sent them to defendant.

(4) The TWA air freight receipt which shows that Wiedersum paid $21 to TWA for a shipment of merchandise to defendant on March 30th.

(5) The reproduction receipts from Nassau Blue Print Service which show that, on March 29th and 30th, Wiedersum sent out 20 tracings on the South Carolina project for duplication.

Given: _____

Refused: _____

Given as Modified: _____

OFFICE COPY

WIEDERSUM v. NATIONAL HOMES

PLAINTIFF'S REQUEST FOR
CHARGE NO. 5

A corporation is liable for the acts of its officers and employees who act within the scope of their authority, and for the effects of such acts, even though other officers or employees of the corporation, including the president, may not have intended or contemplated such effects. For example, plaintiff has introduced a letter from Mr. John Gleason of National Homes dated January 29, 1973 and testimony regarding a meeting between Mr. Gleason and Mr. Voorneveld on February 26, 1973. Plaintiff claims that Mr. Gleason's letter, and his conversation with Mr. Voorneveld on February 26th, established an agreement between the parties to work together to prepare and submit a bid on the South Carolina project. If you should find that such an agreement was established by virtue of one or both of these events, then it does not matter that Mr. Gleason was not the president of National Homes Construction Company or that certain of defendant's officers, such as Mr. Woolery, might not have been aware of or consented to such an agreement.

Given: _____

Refused: _____

Given as
Modified: _____

OFFICE COPY

WIEDERSUM v. NATIONAL HOMES

PLAINTIFF'S REQUEST FOR
CHARGE NO. 6

With regard to the third issue, whether Wiedersum was damaged on account of defendant's failure to submit a bid on the South Carolina project: in order for you to find for plaintiff you must find, by a preponderance of the evidence, that Wiedersum expended time and effort in preparing site and architectural drawings for the South Carolina project as the result of an agreement that it would work with defendant to prepare and submit a bid on the project. You must further find that Wiedersum would not have expended time and effort in preparing complete site and architectural plans on the South Carolina project had it known that defendant would not be submitting a bid on the project or that defendant was reserving the right to make a last-minute decision not to submit a bid on the project.

Given: _____

Refused: _____

Given as
Modified: _____

WIEDERSUM v. NATIONAL HOMES

PLAINTIFF'S REQUEST FOR
CHARGE NO. 7

If you find, by a preponderance of the evidence, that there was an agreement between Wiedersum and National Homes to work together to prepare and submit a bid on the South Carolina project, that Wiedersum performed its part of the agreement by preparing and delivering the final drawings to defendant on March 30th, and that, as a result of that agreement, plaintiff expended time and effort in preparing the site and architectural plans for the South Carolina project, then plaintiff is entitled to have its damages determined by you. Accordingly, if you find in plaintiff's favor on these issues, I instruct you that plaintiff is entitled to recover the reasonable value of its services in preparing the site and architectural plans for the South Carolina project. If you reach the question of damages, you must decide, on the basis of all the evidence, the reasonable value of plaintiff's services in preparing the site and architectural plans for the South Carolina project.

Plaintiff has presented evidence tending to show that the reasonable value of its services was $250,000,

based upon the size of the project, the hours expended and its customary fee for other projects of like size. If you find, by a preponderance of the evidence, that the reasonable value of plaintiff's services was $250,000, then you may return a verdict in favor of plaintiff for that amount even though, had a bid actually been submitted by National but rejected by the Department of the Navy, plaintiff would not have been entitled to any compensation from defendant. In other words, the fact that under the agreement Wiedersum was to receive a fee in the amount of $250,000 only if National was the successful bidder on the project does not preclude Wiedersum from recovering $250,000 as a result of defendant's breach of the agreement, if you find that that is the reasonable value of plaintiff's services in connection with the project. You may also, of course, find that the reasonable value of plaintiff's services is less than $250,000 and award a verdict in such lesser amount.

Given: _____

Refused: _____

Given as Modified: _____

Authority: Hunter v. Vicario, 146 App. Div. 93, 130 N.Y.Supp. 625 (1st Dept. 1911); Weiser v. Stadium of Carnarsie, 137 Misc. 881, 244 N.Y.Supp. 61 (N.Y. Co. 1930); Boomer v. Muir, 24 P.2d 570, 578 (Cal. Dist, Ct. App. 1933).

PLAINTIFF'S REQUEST FOR
CHARGE NO. 8*

If you find, by a preponderance of the evidence, that there was an agreement between Wiedersum and National Homes to work together to prepare and submit a bid on the South Carolina project, that Wiedersum performed its part of the agreement by preparing and delivering the final drawings to defendant on March 30th, and that, as a result of that agreement, plaintiff expended time and effort in preparing the site and architectural plans for the South Carolina project, then plaintiff is entitled to have its damages determined by you. Accordingly, if you find in plaintiff's favor on these issues, I instruct you that plaintiff is entitled to recover compensation for the time and expense it incurred in preparing the complete site and architectural plans for the South Carolina project. If you reach the question of damages, you must decide, on the basis of all the evidence, the amount of the compensation to which plaintiff is entitled by virtue of the time and expense it incurred on the South Carolina project.

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* To be requested only if Request No. 7 is refused.

Plaintiff has presented evidence tending to show that the time and expense it incurred in preparing the site and architectural plans for the South Carolina project was $_____, based upon the hours spent on the project by its various employees and the respective amounts of their normal hourly rates. If you find, by a preponderance of the evidence, that the time and expense which plaintiff incurred on the South Carolina project was $_____, then you may return a verdict in favor of plaintiff for that amount even though, had a bid actually been submitted by National but rejected by the Department of the Navy, plaintiff would not have been entitled to any fee from defendant. In other words, the fact that under the agreement Wiedersum was to receive a fee in the amount of $250,000 only if National was the successful bidder on the project does not preclude Wiedersum from recovering $_____ as a result of defendant's breach of the agreement, if you find that that is the amount due plaintiff as compensation for its time and expense on the project. You may also, of course, find that the amount due plaintiff as compensation for its time and expense on the project is less than $_____ and award a verdict in such lesser amount.

Given: _____

Refused: _____

Given as
Modified: _____

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES,

Plaintiff,

-against-

NATIONAL HOMES CONSTRUCTION CORPORATION,

Defendant.

74 Civ. 823

(WB)

- -x

PLAINTIFF'S PROPOSED FORM OF VERDICT

We, the jury, duly empaneled in the above-entitled action, find in favor of plaintiff and against defendant and award damages in the amount of $_____.

Dated:

_____

Foreman

DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS

12-23-75

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

FREDERIC P. WIEDERSUM ASSOCIATES, :

Plaintiff, : DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS

-against- :

NATIONAL HOMES CONSTRUCTION CORPORATION, : 74 Civ. 823 (WB)

Defendant. :

- -x

Defendant National Homes Construction Corporation hereby requests the Court to instruct the jury as follows:

1. Plaintiff, Frederic P. Wiedersum Associates is an architectural firm and brings this action against defendant National Homes Construction Corporation, which is a firm that is engaged in the business of constructing, among other things, multi-unit dwellings such as dormitories and housing for the military. Plaintiff bases its claim for damages on the fact that a proposal was not submitted by defendant to the Department of the Navy which was then awarding construction contracts for a 200-family housing facility to be constructed at the Naval Weapons Station, Charleston, South Carolina ("South Carolina Project") on the basis of competitive bids.

2. Plaintiff contends that it had an agreement with defendant whereby plaintiff would design plans to be submitted to the Navy as part of a competitive bidding for the South Carolina Project, and that, in the event the proposal

submitted by defendant was successful and defendant was awarded a construction contract for the South Carolina Project, plaintiff would receive a fee of $250,000. Plaintiff contends that it fulfilled its agreement by drafting the plans but that defendant breached its agreement and did not submit a proposal. Plaintiff furthermore contends that defendant is liable to it for the value of its services or, in the alternative, for any costs and expenses incurred by it in drafting the plans.

3. Defendant contends that a decision was made not to submit a proposal because the plans drafted by plaintiff did not arrive in sufficient time to enable it to do the work that was necessary in order for a proposal to be submitted, and that, in any event, the plans which plaintiff sent to defendant were so deficient that no responsible bid could be submitted.

4. Defendant further contends that, while it did work with plaintiff to investigate the possibility of submitting a proposal and worked with the expectation that a proposal would be submitted and would be successful, it at no point agreed or represented to plaintiff that a proposal would in fact be submitted and that each party had the right to cease work whenever it chose, so long as it did not mislead the other party.

5. Plaintiff is asserting two separate claims against defendant. As you consider each claim asserted by plaintiff, keep in mind that plaintiff has the burden of proof as to each necessary element of each claim asserted. Plaintiff must meet his burden of proof by preponderance of the evidence. This means that the evidence on plaintiff's side of the issue must outweigh the evidence on defendant's side as

to each necessary element of each claim asserted by plaintiff in order for you to find in plaintiff's favor on a particular claim. I will now instruct you on the claims being asserted and the necessary elements of each.

Contract Claim

6. Plaintiff contends that defendant was contractually bound to submit a proposal based on plans prepared by plaintiff and that by not submitting such a proposal, defendant breached its contract with plaintiff. The elements of a breach of contract claim are (1) an agreement or promise by a defendant to do something in consideration for, or in other words in return for, a promise or act by plaintiff, (2) the failure of defendant to perform its agreement or promise after the plaintiff has performed or is willing to perform his part of the bargain, and (3) damage caused to plaintiff by defendant's failure to perform. Plaintiff must establish each of the elements of its breach of contract claim by a preponderance of the evidence in order for it to recover on that claim.

7. The key factor in determining whether an agreement or promise was made is the intention of the parties. The parties are not bound unless that is their intention. That intent is gleaned from the words and actions of the parties as understood by reasonable men of ordinary carefulness and intelligence in the circumstances. It is not necessary that a party's agreement or promise be expressed in words. It may be implied from acts. However, the acts must evidence to an ordinary man an intention to be bound.

8. Plaintiff contends that defendant agreed or promised that a proposal would be submitted so long as plaintiff submitted proper and timely plans to defendant for the South Carolina Project. It is conceded that between late January and early April, 1973 the parties worked together evaluating the possibility of submitting a proposal for the South Carolina Project. Defendant contends that there was never a commitment by either party that a proposal would be submitted, although the parties proceeded with the hope and expectation that a successful proposal might be developed and submitted. Defendant contends that it did not and would not make such an agreement prior to reviewing plaintiff's final plans for the South Carolina Project.

9. You must determine on the basis of the evidence presented whether plaintiff has established by a preponderance of the evidence that defendant's words or actions evidenced an agreement or promise to submit a proposal. In this connection, defendant's hope or expectation that a proposal would or could be submitted is not in and of itself sufficient. It must be established that there was an agreement or promise by defendant or you must return a verdict in its favor.

10. If you find that the words or actions of defendant did in fact evidence a promise or agreement to submit a proposal, you must determine whether plaintiff submitted plans to defendant in sufficient time to enable it to do whatever was required in order that a proposal might be submitted. In the event that you find the plans were submitted to defendant in

a timely manner, you must next consider whether the plans submitted met the requirements of the Navy. If you fail to find by a preponderance of the evidence either that the plans were timely submitted or that they did not meet the requirements of the Navy, you must return a verdict in favor of defendant. 164a

Promissory Estoppel

[This charge on this claim is being requested in the event that the Court decides that plaintiff has a claim based on promissory estoppel.]

11. Plaintiff's second claim is based on promissory estoppel and it must establish each of the elements of that claim by a preponderance of the evidence in order to recover. The elements of a promissory estoppel claim are (1) affirmative promise to act by defendant, (2) a reasonable reliance by plaintiff on the promise, (3) the failure of defendant to perform its promise and (4) damage caused to plaintiff.

12. Plaintiff contends that it would not have started to work in drafting plans for the South Carolina Project if it had thought there was a chance that a proposal might not be submitted. It contends that defendant made an affirmative promise that a proposal would be submitted and that it acted in reliance thereon in starting to draft plans. Defendant contends that it made no such promise and that the process of putting together a proposal is such that any one of a number of problems might have aborted the attempt and therefore the promise even if made could not have been reasonably relied upon.

13. A further necessary element of any recovery by plaintiff is damages in a certain amount. This element, too, must be proved by plaintiff by a preponderance of the evidence. In order for plaintiff to be awarded damages, the amount of the damages must be proven to a reasonable degree of certainty. The amount of damages cannot be left to speculation or conjecture. Plaintiff contends that as a result of wrongs by defendant it incurred various costs and expenses. You must be satisfied to a reasonable degree of certainty that plaintiff did in fact incur such costs and expenses and the amount incurred before such an amount can be awarded as damages.

14. Defendant contends that any costs and expenses that plaintiff incurred were in connection with the preparation of a proposal and that it was at all times understood that each party was to bear its own expenses and would have no right to reimbursement from the other. If you find by a preponderance of the evidence that it was understood that any costs that might be incurred by either party would be borne by that party and the only right to receive any amounts in connection with a proposal would be in the event that the proposal was successful and the contract awarded, then you should return a verdict in favor of defendant.

Dated: New York, New York
December 8, 1975

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for defendant
National Homes Construction
Corporation

OFFICE COPY

JUDGMENT ENTERED DECEMBER 12, 1975 ON JURY VERDICT

JUDGMENT ON JURY VERDICT

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
DEC 12 1975
TIME A.M.
P.M.

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 74 C 823

FREDERIC P. WIEDERSUM ASSOCIATES

vs.

NATIONAL HOMES CONSTRUCTION CORPORATION

JUDGMENT

This action came on for trial before the Court and a jury, Honorable WALTER BRUCHHAUSEN, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the plaintiff,

It is Ordered and Adjudged that plaintiff recover of the defendant the sum of $150,000.00 together with interest, costs and disbursements of this action.

Dated at Brooklyn, New York, this 12th day of December, 19 75

LEWIS ORGEL
Clerk of Court

BY [signature]
Deputy Clerk

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* * *

subcontractors and make sure that the prices were okay.

Well, on March 30th, the plans, the final plans were completed by Wederson, and those plans were given to Mr. Laverty, and Mr. Laverty will testify about this in detail, but in essence he called Mr. Duley of National Homes, or at least he talked with him on the phone, and he said, We have our plans, we are ready to send them out to you. And they agreed that the best way to do it was to put them on an airplane, not to send them by mail or air freight, but literally to take them out to the airport and put them on a regular scheduled domestic flight. Mr. Laverty took the plans and he did just that and put them on a flight. It was flight No. 463, I believe, TWA, and he sent the plans along with some other documents to Mr. Duley at National Homes. Now that was on March 30th.

On April 5th, Mr. Laverty of Wederson sent another group of plans to National Homes. These plans were almost equal to the plans that were sent on March 30th, the only difference being that there was an extra page, there was a cover sheet and there were a couple of very, very, very minor revisions to the plans. You will see again these plans, these

plans will be introduced, and you will see on them that there are about five pages which have a notation at the bottom that says, "revised April 3rd," "revised April 4th." They were very minor revisions and certainly did not affect in any way National's ability to go out and get the prices.

The same procedure was followed on April 5th. Mr. Laverty took the plans to the airport. He put them on a TWA flight and he sent them out to National. And again he had a phone call with National's office, he spoke with someone in Mr. Payne's office and told them again that these plans are on the way, and the people at National told him, "Yes, we will pick them up and then we will fly them, we at National will get these plans and will fly the bid down to Charleston, South Carolina on April 6th in time to get them there to file before the bidding deadline."

A couple of other things happened. About that time Mr. Voorneveld wrote a letter to National and also had a phone call telling National what Wederson's fee would be in the event that National was the winning bidder, and he discussed that fee with Mr. Wederson and then he called Mr. Gleason and told him that the fee would be $250,000.

* * *

MR. SIMMONS: (Continuing) The bid for the submission. Shortly after it would have to be in. There is a great deal of time. The work would start. They would prepare plans and whatever would would have to be done in order to put in a proposal.

Now let me apply that order to the facts here. The evidence will show that the invitation to the South Carolina project was in mid-January of 1973. The date for the submission of the proposals was April 6, 1973. I mentioned another date being the date of the pre-proposal letter and the pre-proposal conference. It wasn't held until February 20th. So you see that in terms of drafting plans and putting in proposals you really have from February 20th until April 6th. Approximately six weeks.

The evidence will show again this is an exceedingly difficult task and that no one really has enough time and that is one of the many facets that poses a problem. You just don't know whether you're going to be able toaccomplish it. Again, because your proposal, it has to be submitted and the Navy requires it has to indicate what the costs are, what the price is going to be. You have to have bids. Bids from subcontractors. So you don't really know

what your costs are going to be until you have these bids. The evidence will show that you cannot determine these amounts until you're pretty far down the line, at least have the preliminary plan. So to say an agreement was reached in January to put in a proposal would have to be viewed against these facts and I think the evidence will show there is no such agreement that was made. That only what happened here is the parties working together made a good-faith attempt to put in a proposal.

Now I mentioned before quite briefly that the plans didn't arrive. We think the evidence will show they didn't arrive in sufficient time to enable us to do what had to be done. Let me spend a little more time on that.

The evidence is going to show that the Plaintiff in this case was told in no uncertain terms that we required a minimum of six to eight days to work with these plans before the submission date, for a number of reasons. We were the contractor in this situation and the Plaintiff was the architectural firm. They did the drafting. We were going to do the building. So a very important aspect of this was whether or not we could put up indeed what they were designing. I

think this is another factor the evidence will show and will exclude any sort of rumor that prior to receiving the plans, Wiedersum had to review those plans to make sure that our subcontractors were willing to give us bids for the things that had to be done. The evidence will show that eight sets of final plans arrived with a letter from Mr. Laverty, the day before. Eight sets came the day before the submission was to be made. That letter refers to the fact that the architectural engineering plans are enclosed. The letter that Mr. Morrison referred to a week before the Friday, before March 30th, refers to bi documents being enclosed. There is no reference to plans.

The evidence will show when you have an opportunity to examine that letter, it was sent to Mr. Arvil Duley at National. Mr. Duley will testify, he will testify about his involvement with the South Carolina project and that was to assemble the bid documents.

Now what are the bid documents? The bid documents are forms that are prepared by the Navy. They are printed by the Navy. They are used by the potential bidder, by National and by others to file the forms that are necessary to be submitted as part

* * *

(Witness excused.)

MR. MORRISON: I call Mr. Bill Laverty, please.

WILLIAM LAVERTY, called as a witness, having been first duly sworn, took the stand and testified as follows:

THE CLERK: State your full name.

THE WITNESS: William G. Laverty.

THE CLERK: Your address.

THE WITNESS: 21 Marlboro Road, Babylon, New York.

THE CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. MORRISON:

Q Mr. Laverty, what is your occupation?

A I am a business developer with Wiedersum Associates.

Q How long have you been with them?

A Since 1971.

Q Can you just give us briefly your educational background?

A I have two years of engineering school.

Q From where?

A Polytech Institute.

Q You'll have to talk a little louder.

A Polytech Institute in Brooklyn.

Q I take it you're basically on the business side of the firm?

A Yes, sir.

Q Now are you familiar with the project involving National Homes known as the War Minister project?

A Yes, I am, sir.

Q And what was the substance of that project, what did it involve?

A It involved two hundred family housing units at the Naval Air Station at War Minister, Pennsylvania.

Q How did this project come up, do you recall?

A I contacted the Northern Division of the Navy with reference to upcoming projects and I was informed that they would be having this housing project.

Q What did you do after learning of that?

A After I got back to our office, we -- I wrote a letter to the Navy requesting that our name, along with -- since we were working with National, be considered for this project. In time we would then, when the project came up they would send us an invitation to put in a proposal.

Q Did they send you an invitation?

A Yes, they did.

Q Did you have any contact with National Homes about this project?

A Persoally, myself, no. I assume Mr. Voorneveld handled that.

Q Now, we've admitted into evidence a memorandum dated December 20, 1972, Plaintiff's Exhibit 2.

You prepared that memorandum; is that correct?

A Yes, I did.

Q Did you have occasion to discuss that memorandum with anyone from National Homes, the substance of that memorandum?

A Yes, I did, sir.

Q And do you recall when that was?

A That was Mr. Gleason on the 20th when he came to our office?

Q 20th of what?

A December, 1972.

Q '73?

A December 1972.

Q '72. That was the day after you had been to Warminster.

A Yes. I picked him up at the airport.

Q What gave rise to this meeting with Mr. Gleason

on the 20th?

A Well, when we found out that by telephone I talked to the Northern Division that we were second on the proposal. I went down -- well, prior to my going down to meet with the Northern Division we knew about what we wanted to do as far as this information, to develop future projects coming out. So we contacted Mr. Gleason and we asked him to come in on the 20th because I was going on the 19th to get as much details as I could on the Warminster submission, which I did. It was to indicate our mistake.

Q Someone from your office contacted Mr. Gleason and asked him to come over?

A Yes.

Q Were you present at that meeting on the 20th?

A Yes, I was, sir.

Q Do you recall what was said between yourself and Mr. Gelason?

A Myself personally, I didn't have too much to say.

Q Do you recall the substance of the conversation at that meeting?

A Yes. The basic discussion at the meeting was with Mr. Masino who was the head of the engineering facility at the Northern Division. I discussed what I was told as far

as submission was concerned. I informed them of the Northern Division's information and they had informed me how we can possibly improve our submissions.

Q Did you discuss this with Mr. Gleason, any specific things that were to be done on further submission?

A Yes. As far as avoiding putting in wiring which really isn't my field. But, between Mr. Voorneveld and Mr. Wiedersum, they conveyed this message to him.

Q Now, did there come a time when you heard of a project involving the naval facility at South Carolina?

A Yes, I did.

Q When did you first hear of that?

A I believe we got notice of a proposal on January 16, 1973.

MR. MORRISON: May I have this marked as Plaintiff's Exhibit 3 for identification?

THE CLERK: Document entitled Department of Navy, Southern District, marked for identification as Plaintiff's Exhibit 3.

(So marked.)

Q Mr. Laverty, I show you what has been marked as Plaintiff's Exhibit 3 for identification and ask you if that is the notice you received, or a copy of the notice that you received?

A Yes, sir.

MR. MORRISON: I offer this as Plaintiff's Exhibit 3.

MR. SIMMONS: No objection, your Honor.

THE COURT: Mark it.

THE CLERK: Document marked Plaintiff's Exhibit 3 for identification, now received in evidence.

(So marked.)

Q Do you recall what the original bidding deadline was on this project?

A I believe it was March 16, 1973.

Q Now did you talk with anyone at your firm after you received this notice from the Navy?

A Yes, I did, sir.

Q Who did you speak with?

A Mr. Fred Wiedersum.

Q What was the substance of your conversation with him?

A Well, the substancewas relating back to the fact of our December 20th meeting with Mr. Gleason. I asked him if actually prior to me sending for my plans that the Navy was going to offer us for a proposal, I asked him if it would be proper for me to do so.

Q And what did he say?

A Yes. He said fine. Go ahead, it doesn't cost anything to get the plans.

Q Now did you discuss with him whether or not you should contact National?

A Yes, sir.

Q And what was the substance of that discussion?

A I asked him if I should write to Mr. Gleason, give him the information and find out what their response would be. Whether or not they would be interested in the submission on the South Carolina project.

Q What was the answer?

A This was on January 19th or 29th.

Q What did Mr. Wiedersum say?

A He said, "Sure, go ahead, do the job."

Q Did you in fact write to Mr. Gleason?

A Yes, I did.

MR. MORRISON: May I have this marked as Plaintiff's Exhibit 4 for identification?

THE CLERK: Letter dated January 23, 1973, addressed to John Gleason, marked for identification as Plaintiff's Exhibit 4.

MR. SIMMONS: Your Honor, may I have a voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. SIMMONS:

Q Mr. Laverty, is this your copy of the letter?

A I haven't seen it, sir.

(Defense counsel handing witness exhibit)

A This letter was in the file, sir.

Q This is a copy?

A It is my copy.

Q Yes?

A No.

Q I notice it went to a number of people.

A It went to the file. That's where we --

Q This is the file copy?

A Yes.

Q This is not yours?

A Offhand, I couldn't say from this.

Q Mr. Laverty, do you know whose handwriting it is at the top of the page? Do you know whose handwriting it is?

A Yes, it looks like mine.

Q Do you know where the copies are going to, where the copies were to go?

A Yes, sir.

MR. SIMMONS: No objection, your Honor.

THE CLERK: Document marked for identification as Plaintiff's Exhibit 4, is now received in evidence.

DIRECT EXAMINATION

BY MR. MORRISON:

Q Is this the letter you sent to Mr. Gleason after discussing the matter with Mr. Wiedersum?

A Yes, sir.

Q Would you read this letter to the jury, please?

A "Dear Mr. Gleason: We are interested in submitting a proposal along with National Homes for the construction of 200 family housing units at the naval weapons station, Charleston, South Carolina. The specifications and other detailed information are being sent to our office and I will forward a copy to your office.

"If we employ the methods we discussed in our office on December 20, 1972, we should both be able to get this proposal out at minimum cost.

"The funds available are quoted at $3,904,000. Hopefully, we will be able to use our last housing designs, with slight modifications.

"The date for proposal submission is March 16, 1973. A pre-proposal conference is scheduled for February 14, 1973 in South Carolina. Very truly yours,

William G. Laverty."

MR. MORRISON: Please mark this as Plaintiff's Exhibit 5.

THE CLERK: Letter dated January 29, 1973 addressed to William G. Laverty. Marked for identification as Plaintiff's Exhibit 5.

(So marked.)

Q Mr. Laverty, did you receive a response to your letter of January 23rd?

A Yes, I did.

Q Who did you receive a response from?

A From Mr. John Gleason.

Q I show you Plaintiff's Exhibit 5 for identification and ask you if that is the response?

A Yes, it is, sir.

MR. MORRISON: I offer this into evidence as Plaintiff's Exhibit 5.

MR. SIMMONS: No objection, your Honor.

THE COURT: Mark it.

THE CLERK: Document marked Plaintiff's Exhibit 5 for identification now received in evidence.

(So marked.)

Q Would you read this letter to the jury?

A Certainly.

"Mr. William G. Laverty, Frederick P. Wiedersum Associates.

"Dear Mr. Laverty:

"This is in answer to your letter of January 23, concerning 200 family housing units at the naval weapons station, Charleston, South Carolina. National looks forward to the opportunity of submitting a proposal along with Frederick P. Wiedersum Associates on this project.

"After we have received the specifications and have had a chance to review same, I feel it advisable that our people who have been working on the Air Force projects meet with your people to discuss the proposal in more detail. I would further propose that our architect and estimator attend the pre-proposal meeting, along with people from your office on February 14th only because of the many meetings they have recently attended and the fact that they might ferret out some information otherwise missed that will be helpful to you in the development of the plans.

"I will await word from you as to the time and place of our meeting.

"Very truly yours, John Gleason, Vice President."

Q Now you said you discussed with Mr. Wiedersum

sending for the plans and specifications from the Navy.

First of all, what are the plans and specifications that you are referring to?

A Usually they are the conditions on the site. They give us boring details. In other words, the soil conditions on the site. The utilities that are available to us. After we design our plans or as we are designing the plans and specifications it would be our duty, they would expect us to design it so as to what we expect National Homes to give.

Q Physically, what are the drawings in the documents?

A They consist of the specifications and --

THE COURT: What's the exhibit number?

A And forms. A set of plans which are, they run, you know, 36, maybe by 36.

Q Like drawings?

A Like blueprints. They are blueprints from the Southern Division.

Q Did you in fact send for those?

A Yes, sir, I did, sir.

Q Did you receive them?

A Yes, I did, sir.

Q Did you forward those to National?

A Yes, I did, sir.

Q Do you recall when you forwarded them?

A The exact date I do not know offhand.

Q Do you recall who you sent them to?

A I believe I said Mr. Floyd Payne.

Q Now did you receive just one set of these plans and specs?

A No, they were either -- there were duplications.

Q So you kept a copy for the firm?

A Yes.

Q You kept a copy?

A We submitted them or we distributed them, Mr. Voorneveld was in charge of that and we just physically reviewed them.

Q Was there something you had to do with them, is what I am asking?

A Was there something we had to do with them?

Q Yes.

A Basically not. We reviewed them to make ourselves aware of the fact we had this agreement and that we were preparing ourselves in case National -- until after a pre-proposal meeting. So we prepared basically.

Q You didn't review the plans?

A I did not, no.

MR. MORRISON: Can you mark this as Plaintiff's Exhibit 6, please, for identification.

THE CLERK: A letter dated February 7, 1973, to National Homes Construction Corporation marked for identification as Plaintiff's Exhibit 6.

(So marked.)

Q Mr. Laverty, I show you Plaintiff's Exhibit 6 for identification. Did you write that letter?

A It doesn't have my signature.

Q Just that letter before --

A Looks very familiar, yes. I cannot say. I don't believe that's my signature.

Q That is not your signature?

A Yes.

Q Did you send the plans and specs to National?

A Yes, I did, sir.

Q To Mr. Payne?

A Yes, I did, sir.

Q Now did there come a time when a pre-proposal conference for the South Carolina project took place?

A Yes, sir.

Q Could you explain what a pre-proposal conference is, to his Honor?

A A pre-proposal conference to my knowledge is

when the contractors and whoever are planning to submit a bid are invited by the Navy to the site to review the conditions of the site and to ask any questions they have in relationship to the plans and the performance of the specifications sent by the Navy.

Q Now had you ever been through a pre-proposal conference?

A Yes.

Q On which project?

A On the Warminster project.

Q Now, was there a pre-proposal conference on the South Carolina project?

A Down in Charleston.

Q Do you recall when it was held?

A It was originally scheduled for the 14th. I believe it was postponed until February 20th.

Q Did anyone from your firm attend these conferences?

A No, we did not.

Q Do you know why?

A Basically, we didn't find it necessary after talking to National's people.

Q Did you discuss this with anybody at Wiedersum with regard to whether or not you should attend a

pre-proposal conference?

A Yes.

Q Who did you discuss it with?

A Mr. Wiedersum and Mr. Voorneveld.

Q What did they say?

A Originally, I believe we were contemplating attending and then after discussing with National people it was determined that we didn't have to attend.

Q And who did you discuss it with at National?

A Mr. Payne.

Q Did your firm do anything in connection with the pre-proposal conferences?

A Did we do anything?

Q Yes.

A Yes. We prepared a list of questions.

MR. MORRISON: I ask this be marked as Plaintiff's Exhibit 7 for identification.

THE CLERK: One-page memorandum, site considerations, marked for identification as Plaintiff's Exhibit 7.

(So marked.)

Q Mr. Laverty, I show you Plaintiff's Exhibit 7 for identification. Can you identify this document?

A Looks like the list of questions.

Q Now did you write the list of questions?

A No, I did not.

Q To your knowledge, who did write this?

A These questions were prepared by Stan Moyd of our designing department.

Q Designing department?

A Yes.

Q At Wiedersum's?

A Yes.

Q Did he discuss this with you?

A Personally, no.

Q Did he give you this document?

A He gave me this. As a matter of fact, I believe in my discussion prior to Mr. Voorneveld we requested a list of questions they would like us to have Mr. Payne answer when he went down to the pre-proposal conference.

Q So you discussed the list with Mr. Payne?

A Yes.

Q Of National Homes.

A Yes.

Q Was this person-to-person or on the telephone?

A Beg your pardon?

Q Person-to-person or by phone?

A By phone.

Q And what did you do with you discussed this with Mr. Payne, what was said?

A Well, we made it clear we weren't going to attend and we read the list of questions that we did have so that he could pass them on, if he thought necessary, at the pre-proposal conference.

Q Those questions are about the site?

A About the site, right.

Q I notice there is some handwriting at the bottom of that memorandum. Whose handwriting is that?

A That is mine, sir.

Q What does the handwriting reflect?

A Reflects a phone call I made with Mr. Payne about the conference and stating they could come to our office more than likely after the meeting. I also requested a set of National standards.

Q What are their standards?

A Their standards are design criteria.

Q Why did you need those standards?

A To have an extra set or a copy, extra copy in the office.

Q You already had the standards.

A Yes.

Q You were getting another set?

A Yes.

MR. MORRISON: I offer this into evidence as Plaintiff's Exhibit 7.

MR. SIMMONS: No objection.

THE COURT: Mark it.

THE CLERK: Document marked for identification as Plaintiff's Exhibit 7, now received in evidence.

MR. MORRISON: I would like to have this document marked as Plaintiff's Exhibit 8 for identification.

THE CLERK: Document entitled Departmental correspondence dated February 21, 1973, marked for identification as Plaintiff's Exhibit 8.

(So marked.)

MR. MORRISON: May it please the Court, this document is a memorandum from Mr. Payne of National Homes to Mr. Gleason of National Homes identified by Mr. Payne on his deposition. I am prepared to cite the page, but I assume Mr. Simmons will have no objection?

MR. SIMMONS: I think I made that --

MR. MORRISON: It's on page 33.

MR. SIMMONS: I would like to have the page.

MR. MORRIS: Page 33.

MR. SIMMONS: Your Honor, I think I am going to object at this time to introducing the exhibit through this witness. If Mr. Morrison wants to submit it later by either reading from Mr. Payne's deposition or questioning him, that would be a different situation.

But at this time I do object to the introduction through this witness.

MR. MORRISON: Your Honor, I am trying to keep it chronologically. I could call Mr. Payne. I am sure he could testify to what happened. I don't think there is any real dispute why Mr. Payne wrote this memo.

THE COURT: Is there any objection to delaying it?

MR. MORRISON: Pardon?

THE COURT: Is there any objection to waiting until --

MR. MORRISON: I would like to get it in so I can read a couple of paragraphs.

THE COURT: I will allow you to withdraw it later.

MR. MORRISON: Thank you.

THE CLERK: Document marked Plaintiff's Exhibit 8 now received in evidence.

(So marked.)

MR. MORRISON: I wish to read from the second paragraph of the memorandum from Mr. Payne to Mr. Gleason. The memorandum is dated February 21, 1973 and this is the last paragraph of the memorandum.

"We visited the proposed site and it pretty well complements the drawings we have. The site is heavily wooded, eighteen acres, and minor to major swamp areas. Some areas will have to be undercut and re-tilled. The drainage is a network of asphalt-coated steel smooth-flowing pipe. The soil condition is spongy as typical of most of the Southeastern region near the coast.

"The limitation for this project is $19,520 per unit ($3,904,000). This compares with the Shaw Air Force project which was $19,208 per unit.

"The time for completion is 540 days which includes 90 days for plans, etc. However, they did say the working drawings could be approved in segments.

"Extension of proposal time is being considered. However, we should get things rolling with Wiedersum Associates. Wiedersum was not represented at the meeting and we will have to spend considerable time filling them in."

Q. Mr. Laverty, Mr. Payne's memorandum refers to

a possible extension of deadline from March 16.

Do you recall whether or not that was in fact extended?

A Yes, it was.

Q And to what date?

A April 6, 1973.

Q Did you receive a notice to that effect?

A Yes, we did, sir.

MR. MORRISON: Please mark this as Plaintiff's Exhibit 9.

THE CLERK: One-page document, Department of Navy, Naval Facility and Engineering and Command, marked for identification as Plaintiff's Exhibit 9.

(So marked.)

Q Mr. Laverty, I show you Plaintiff's Exhibit 9 for identification. Is that the notice that you received extending the bid deadline?

A It looks like it, sir, yes.

Q Did you notify National of this?

A Yes, we did.

Q I notice some handwriting at the top of this notice. Is that your handwriting?

A Yes.

Q What does it say?

A To Floyd Payne from Wiedersum Associates, signed Bill Laverty.

MR. MORRISON: I offer this as Plaintiff's Exhibit 9.

THE CLERK: Document marked Plaintiff's Exhibit 9 for identification, now received in evidence.

(So marked.)

MR. SIMMONS: No objection.

Q Mr. Laverty, what was your role in the South Carolina project subsequent to the pre-proposal conference and prior to the bidding deadline? Did you have any role at all?

A No, sir. I wasn't involved in design at all.

Q Were there any meetings that you were involved in with anyone from National subsequent to the pre-proposal conference?

A Yes.

Q When was that?

A I attended a March 6th meeting at the Valley Stream office.

Q Do you recall who was there?

A Mr. Voorneveld from our office.

Mr. Payne, Mr. Abramson, Mr. Sameca, all from our office.

Q Abramson, Sameca, they are both from your

office?

A Yes.

Q Mr. Payne was the only one from National?

A I believe so.

Q Do you recall what the purpose of this meeting was?

A I was only into the National meeting, introduction, etc. The purpose at the meeting was to do, to my best recollection, was for Mr. Payne to go over what he had been doing after the pre-proposal conference, to give us any suggestions he might have to aid or to tell us what not to do as far as our procedures. I was only in the meeting at the very early stage of it.

MR. MORRISON: I would like to have this marked as Plaintiff's Exhibit 10 for identification.

THE CLERK: One-page document dated March 12, 1973 marked for identification as Plaintiff's Exhibit 10.

(So marked.)

Q Mr. Laverty, I show you the document that has been marked Plaintiff's Exhibit 10 for identification and ask you if you have seen that item before?

A Yes, sir.

Q Is this the meeting that you referred to on March 6th?

A Yes, sir.

Q And you were there at the beginning of the meeting, but not for the whole meeting?

A Yes, sir.

Q What was Mr. Abramson's position at that time?

A Chief Designer, sir.

Q Was he involved in the South Carolina project?

A Yes, he was.

Q Did you receive a copy of this document from Mr. Abramson?

A Yes, I did, sir.

Q Are those the minutes of that meeting or memorandum of that meeting?

A The memorandum?

Q Yes.

A Yes.

Q Did you receive that memorandum in the regular course of your duties at Wiedersum?

A Yes.

Q Was it the regular practice of the people at Wiedersum to make memorandums of meetings of this nature?

A Yes, sir.

MR. MORRISON: I offer this as Plaintiff's Exhibit 10.

MR. SIMMONS: May we have a moment, your Honor?

Your Honor, could I have a voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. SIMMONS:

Q Mr. Laverty, excuse me, Mr. Morrison, you want to get your notes?

MR. MORRISON: Yes.

Q You have a copy of the memo in front of you?

A No, I don't, sir.

MR. SIMMONS: Could I show it to him?

MR. MORRISON: Sure.

THE WITNESS: Thank you.

Q I note that the memo has a number of items. Were you present during the discussion of all those items?

A I have to read this thoroughly.

Q Yes?

A I believe the only item that I remember is item 4 about the extension date.

Q That is the only item that you can say you were present for at the discussion?

A I was not involved in the design at all, sir.

MR. SIMMONS: Your Honor, I am going to object to the admission of this. I certainly object to the

admission of it as an exception as a business record and I think the voir dire has established that the witness was not present or cannot state that he was present at the discussion of more than one of the items indicated and cannot testify as to the accuracy and I am going to object to the admission of this document.

THE COURT: Let me see the document.

MR. SIMMONS: I have a copy, your Honor, which the Court is free to look at. This is not the one that has been marked.

MR. MORRISON: Your Honor, may I say one thing? Under the rule of evidence, 901, the authentication of a business record does not have to be the person who wrote it. Under Rule 901 it merely has to be someone with knowledge of the matter. All this claims to be is a memorandum of that conference and Mr. Laverty received the memorandum in the regular course of business as a memorandum of that conference. It certainly comes as no surprise, this was produced on discovery. It was no surprise.

MR. SIMMONS: The question is not one of surprise, your Honor. Also the question is of authentication.

THE COURT: I have your point on it.

MR. SIMMONS: Yes?

THE COURT: I will allow it.

You may mark it.

THE CLERK: Document marked Plaintiff's Exhibit 10 for identification, now received in evidence.

(So marked.)

MR. SIMMONS: I'm sorry, the number?

MR. MORRISON: 10.

THE CLERK: 10.

MR. MORRISON: Your Honor, you indicated a desire to adjourn it for fifteen. This may be a convenient point in my presentation, if you wish to?

THE COURT: You are not unwilling to adjourn?

MR. MORRISON: I'm perfectly willing to continue.

THE COURT: This is the usual time to adjourn. It gets a little dark around here and I think it's better to meet with the traffic conditions and all that.

So, we will now recess until a quarter after ten tomorrow morning. Do not discuss the case with anyone or among yourselves. You will report to the Central Jury Room before you come up to your chambers. So you may now withdraw until a quarter after ten tomorrow morning.

(Jury excused.)

(Whereupon, the proceedings were condlued at 4:25 p.m.)

* * *

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FREDERICK P. WIEDERSUN ASSOCIATES,

Plaintiffs,

against

74 C 823

NATIONAL HOMES CONSTRUCTION CO.,

Defendant

United States Courthouse
Brooklyn, New York

~~November~~ December 9, 1975
10:00 A.M.

Before:

HONORABLE WALTER BRUCHHAUSEN, and JURY

U.S.D.J.

ROBERT BRADLEY
Acting Official Court Reporter

Appearances:

ROGERS & WELLS, Esqs.
Attorneys for Plaintiff

By: THOMAS C. MORRISON, Esq.

MILBANK, TWEED, HADLEY & McCLOY, Esqs.
Attorneys for Defendant

By: HARRY L. SIMMONS, Esq.

THE COURT: Good morning, ladies and gentlemen of the jury. You may proceed, gentlemen.

WILLIAM G. LAVERTY, having been previously duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Full name.

THE WITNESS: William G. Laverty.

DIRECT EXAMINATION

BY MR. MORRISON:

Q Mr. Laverty, I had shown you yesterday plaintiff's Exhibit 6 for identification, a letter to Mr. Floyd Payne, dated February 7, 1973. Do you recall that letter?

A Yes, I do, Sir.

Q Do you recall sending it?

A Yes, I do, Sir.

Q Do you recall what you sent with it?

A The plaintiff's specifications sent to us by the Navy.

Q And you sent that to Mr. Payne?

A Yes.

Q And you said, if I remember correctly, that it was not your signature, is that correct?

A Yes.

Q And that it is neither your name at the bottom, the name, or the initials "DMC"?

A That's my secretary's.

Q What was your secretary's name?

A Dianne Cologaro C-o-l-o-g-a-r-o.

Q Doesn't it ever happen that someone in your office would sign your signature to a letter if you weren't there?

A Yes, Sir, if I wasn't in the office and a document had to go out very quickly, yes.

Q Do you recall sending this letter?

A Yes, Sir.

MR. MORRISON: I offer plaintiff's Exhibit 6 into evidence.

MR. SIMMONS: Can I have a voir dire, Your Honor.

THE COURT: Yes.

BY MR. SIMMONS:

Q Mr. Laverty, who drafted this letter? Did you dictate it?

A No, I hand write my letters.

Q So how did it come to be typed and sent out? What would be the procedure?

A I would give it to my secretary and she would type it. If I wasn't going to be in the office and I wanted it to go out immediately, she would sign it for me.

Q Is that a frequent practice?

A I normally don't get involved in that manner, but it has been done before.

Q Is it a normal practice for you to do this with your secretary?

A In this case, yes.

Q Not this case. Has it been done before? Is it a normal practice?

A Yes.

Q For you to write out your letters and tell your secretary to sign?

A If something has to go out immediately, such as this plan did, yes.

MR. SIMMONS: No objection, Your Honor.

THE CLERK: Document marked for identification as plaintiff's Exhibit 6 now received in evidence.

(Marked).

MR. MORRISON: Your Honor, yesterday we marked and admitted into evidence plaintiff's Exhibit 10, and that has not yet been read to the jury. I wish to read portions of that letter to the jury which is plaintiff's Exhibit 10, a report made by Mr. John Abrahamsen of National Homes, Charleston, South Carolina, and it reads as follows:

" On March 6, 1973 at 10:30 a.m.,

Laverty-direct

a meeting was held at the architect's office with the following people present: Messrs: Floyd Payne National Homes. S. Moy, R.J. Scimeka, Frederick P. Wiedersun Associates, R. Brown, W. Liverty of Frederick P. Wiedersun Associates, J.Abrahamsen of Frederick P. Wiedersun Associates.

The purpose of this meeting was to review schematic designs for the project including Site Plan and individual house plans. The following comments were made:

1) Mr. Payne generally approved of our site plan and requested us to combine our units so that we maximize the number of party walls wherever possible."

Item 2 I will skip.

"3) Mr. Payne said that an Addendum to the mechanical requirements would be issued on March 8, 1973.

4) Mr. Payne also stated that there has been an extension with the new date of April 6, 1973, as the date of submission.

5) Before that time, Mr. Payne would like to meet with us once more to review the project (the week of March 19, 1973)." and the name of John K. Abrahamsen, Chief Designer. And it indicates various copies were sent to various people.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Now, Mr. Laverty, did there come a time when you had a discussion with anyone at National Homes regarding the time within which they needed to complete plans at Wiedersun?

A Yes.

Q First of all, do you know who you discussed that with?

A Mr. Payne.

Q Do you recall when you had those discussions?

A Exactly, no.

Q Do you recall what was said?

A That he needed six days to get the final proposals together.

Q Six days from when?

A From the deadline they needed six days back to take the plans and get them to the printer.

Q Six days before April 6?

A Yes.

Q Did he say why he needed six days in advance?

A I am sorry?

Q Did he say why they needed six days in advance bidding deadline?

A So they could get all of their prices together.

Q And is it your understanding that they were going out for the first time during the six day period to get the sub-contract prices?

A Was it my understanding that National was just going to start getting the sub-contract prices?

Q Yes.

MR. SIMMONS: Objection, Your Honor.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Did you have discussions with Mr. Payne about this?

A No, I didn't.

Q Now, did there come a time when Wiedersun completed work on the drawings?

A Yes, that is correct.

Q When was that?

A March 30, of the drawing morning.

MR. SIMMONS: I'm sorry, I didn't hear that. Would the reporter, please, read back the witness' answer.

(Whereby, the reporter read back the witness' answer).

date THE WITNESS: March 30, was the drawing

in the morning.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q In the morning?

A Yes.

Q Did you have occasion to see the drawings?

A Yes, I did.

Q What were the circumstances under which you had occasion to see them?

A When we got them back from the blueprinter.

Q Before I get to that, what form do the drawings take? In other words, are they in pencil on paper, or blueprints, or what?

A The actual drawings are pencil drawings on paper. And we send them out to the blueprinter. In this case we had ten sets of plans run off on the morning of the 30th, which the blueprints are a copy of the actual tracings.

Q Do you recall how many pieces of paper there were?

A There were ten complete sets run off, I believe there were twenty drawings.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 11 for identification.

THE CLERK: A group of drawings marked for

identification as plaintiff's Exhibit #11.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q I show you what has been marked as plaintiff's Exhibit 11 for identification. Can you identify these?

A Yes, Sir.

Q What are they?

A They are the drawings that were placed on the airplane March 30, and sent to National.

Q Now, I direct your attention, Mr. Laverty, to the lower right hand corner of the drawings where there is a little box and various information. And one item in the box says "date". Can you tell us what that date indicates?

A That is the date that the drawings would have been completed.

Q Who would have put that date on the drawings?

A Various persons. Whoever was working on that particular drawing, and finishing up. I can't say exactly who.

Q Would these be considered the original tracings, or reproduced copies?

A These are reproduced copies.

Q This would be what you got back?

A What we got back from the printer.

Q Would you go through each of the pages there and tell us what the date is on each page?

A 30 March,'73. 30 March,'73. 30 March,'73. 30 March,'73. 30 March,'73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73. 30 March, '73 and 30 March, '73.

Q How many pages of drawings are there?

A Twenty, sir.

MR. MORRISON: I offer plaintiff's Exhibit 11 into evidence.

MR. SIMMONS: No objection.

THE COURT: Very well. Mark it.

THE CLERK: Document marked as plaintiff's Exhibit 11 for identification, now received in evidence.

(Marked).

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Now, Mr. Laverty, do you recall what time of the day you received these drawings?

A In the morning, Sir.

Q In the morning. And what did you do with them?

A We received the ten sets of drawings, we had -- I don't know, I would say we kept -- the normal procedure was to keep a set for each one of the departments and the remaining drawings which were six, take them into the printing room and have them wrapped up, the drawings along with the government forms in an elongated package.

Q Now, you say you sent those drawings to National?

A Yes, I did.

Q Who did you send them to?

A Mr. Orville Duley's attention.

Q Did you send anything else along with the drawings to Mr. Duley on that date?

A Yes, government forms.

Q What kind of forms are these?

A I am not that familiar with them. They are forms that the government requires the contractors to fill out prior to submissions of the bids.

Q And why were you sending those?

A They requested them.

Q Who is they?

A Mr. Duley.

Q Requested that they be sent?

A Yes, Sir.

Q Why did you send this package of plans and forms to Mr. Duley, as opposed to anyone else?

A Well, my correspondence and my conversations were with Mr. Duley prior to my sending these plans on the plane, I called him to let him know what flight they were put on. And I just addressed the letter to Mr. Duley.

Q Did you send a letter to Mr. Duley along with this package?

A Transmittor letter.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 12 for identification.

THE COURT: Yes, it is to be considered marked.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, I show you plaintiff's Exhibit 12 for identification, and I ask you if you can identify this document?

A Yes.

THE COURT: Is there a date on it?

THE WITNESS: March 30, 1973.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Is that the letter you sent to Mr. Duley?

A Yes, it is, Sir.

Q And is that your signature on the letter?

A Yes, it is, Sir.

Q Now, I'll direct your attention to the attachment to that letter. Can you identify that?

A Yes, Sir. It is the receipt I received from the airplane after I placed the plans and the government forms on the plane.

MR. MORRISON: I offer plaintiff's Exhibit 12 for identification into evidence as plaintiff's Exhibit 12.

MR. SIMMONS: No objection.

THE CLERK: Plaintiff's Exhibit #12 for identification now marked as plaintiff's Exhibit #12 in evidence.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Now, Mr. Laverty, with regard to your letter, you say simply:

" Enclosed are the bid documents for the Naval Housing project at Charleston, South Carolina."

Your use of the words "Bid documents" what did that refer to?

A Plans and the forms, any forms, specifications and the plans. It is a general terminology.

Q You were referring to the entire package?

A Yes, Sir.

Q Now, do you recall how the items were wrapped?

A Yes, they were wrapped I believe in brown paper an elongated package. I had it wrapped in the wrapping room.

Q Were these both in the same package?

A Yes, Sir, I sent the government forms the same way that we received them. They were wrapped in the elongated set of plans that the government sent to us.

Q What size are the government forms you are talking about?

A 8½ by 11.

Q Just show us what you did using these plans and pretend these are the government forms? Just show us what you did, what you physically did?

A The plans were rolled up simply like this and stick the forms like this (indicating), in the package.

Q And the package was wrapped?

A Yes.

Q Now, how did this TWA business work?

A There were two flights out of La Guardia I believe going to Indianapolis, the home office.

Q Are these scheduled domestic flights?

A Yes. And in previous conversations we were asked the quickest way to get the plans to National Home, and it was determined to stick them right on a plane. And I just called National prior to my putting the plans on the plane to let them know what flight they were coming on. I confirmed this after I put them on the plane, I called back to tell them that the plans were on the plane, and it would arrive at such and such a time.

Q Just tell us the mechanics you went through to get to the airplane ?

A One hour before flight was scheduled to depart and --.

Q The air carrier was part of a domestic flight?

A Yes.

Q Had you made an investigation into the flights that were going to Indianapolis that day?

A Yes, there was one morning flight and one

afternoon flight. And due to the fact that our drawings were being printed up and would be in the office in the morning, we decided to put them on the afternoon flight.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 13 for identification.

THE CLERK: A folder indicating airline schedule TWA flights marked for identification as plaintiff's Exhibit 13.

MR. SIMMONS: Before we go any further, may we have the TWA receipt.

MR. MORRISON: It is part of Exhibit 12, attached to Exhibit 12.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, I show you plaintiff's Exhibit 13 for identification, and ask if you can identify that?

A Yes, that is the schedule. Flight #145 left in the morning and flight #436 left in the afternoon. I have noted: "package must be delivered 45 minutes prior to flight departure".

Q And when did you make this notation?

A This was made prior to my sending the plans on the 30th. I couldn't tell you exactly the

time it was made, but after I checked the airline flight.

MR. SIMMONS: I'm sorry, I didn't hear that.

MR. MORRISON: He doesn't remember.

I offer in evidence plaintiff's Exhibit 13. I would note for the record that there is some scribbling on the front, and I would make a representation that that was done just the other day, note as to where he was going for trial, and I do not offer that part as the Exhibit. But I do offer the rest.

THE CLERK: Plaintiff's Exhibit 13 received in evidence as indicated by counsel.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, did you make any memoranda regarding what you did on the 30th?

A Yes, I did.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 14 for identification.

THE CLERK: One page document dated March 30, 1973, entitled "memoranda" marked for identification as plaintiff's Exhibit 14.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, I show you plaintiff's Exhibit 14 for identification, and ask you if you can identify this?

A Yes, that is my memo. It is my memo I wrote after I put the plans on the plane on March 30.

Q You made it on that day?

A Yes.

Q Is that your signature at the bottom?

A Yes, it is.

Q Did you make the memoranda in the regular course of business?

A Yes, I did.

Q Was it the regular practice to make such memoranda?

A Yes, it is, Sir.

MR. MORRISON: I offer plaintiff's Exhibit 14 in evidence.

MR. SIMMONS: I would like a voir dire, first, Your Honor.

THE COURT: Yes.

BY MR. SIMMONS:

Q Mr. Laverty, what time of the day was this memo prepared?

A After I got back to the office and called

Mr. Duley.

Q What time of day was that?

A Well, let's see-- I had to be there say half an hour, around 2 or 3 or 4 o'clock.

Q Who typed the memo?

A I am not sure, my secretary.

Q Is that your secretary's signature?

A I don't have any specific secretary. I used two or three different secretaries, and I still do.

Q Now, is it your practice, Mr. Laverty, to prepare a memo for circulation for everything you send out?

A No, Sir, it depends on the circumstances.

Q It depends on the circumstances?

A Yes.

Q What does that mean?

A Well, it depends on what I was sending out. If I have a covering letter or something like that, fine, if not, as in this case, I was stating the facts of what had happened so that everyone in the office would be aware of it.

Q It depends on how busy you are that day, perhaps?

A Not necessarily. But sometimes I make

memos and sometimes I don't.

Q It depends on the circumstances, is that right?

A In general I make memos.

Q Well, a few moments ago you said sometimes you do and sometimes you don't?

A You asked on what I send out.

Q And I believe you said it depends on what you send out?

A Yes, Sir.

MR. SIMMONS: Your Honor, I object to the introduction of this into evidence. I don't think that the testimony concerning the documents indicates that it was the regular course of business to prepare a memo of this sort. We are not talking about authentication, that is not the problem.

THE COURT: I overrule the objection.

THE CLERK: Document plaintiff's Exhibit 14 for identification, now received in evidence.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, would you, please, read plaintiff's Exhibit 14 to the jury slowly?

A Certainly. "Memo reference, National Homes

to Kay. I put final plans for the Navy House project that's Charleston, South Carolina, direct flight to National Homes office. I called early and spoke to Mr. Duley that the plans would be on a TWA flight and he said he would pick them up at the airport. I later called to confirm that the plans were on their way. This would give National Homes the six days they said they needed to complete their final bid proposal which is the complete set on the 6th, which is the deadline, and according to Floyd Payne, he would go to Charleston on the 6th and personally deliver their proposal, presently phoning, etc. etc." and it is signed William G. Laverty.

Q Now, you say in that memoranda that according to Floyd Payne, National planned to fly to Charleston on the 6th and personally deliver the proposal. Had you discussed that with Mr. Payne?

A Previously.

Q Do you recall when you discussed it?

A Exactly when, no.

Q Did he tell you what you say in that memoranda about flying the plans?

A Yes.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 15 for identification.

THE CLERK: One page document dated April 2, 1973, addressed to the Department of Navy, Southern Division, marked for identification as plaintiff's Exhibit 15.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, I show you plaintiff's Exhibit 15 for identification. Can you identify this letter?

A Yes, Sir.

Q What is it?

A It is a letter confirming the conversation I had with the Southern Division office.

Q And is this your signature on the letter?

A Yes, it is.

Q And what did you say in the conversation?

A Shall I read the letter?

Q No, just tell us about the conversation first?

A The conversation was in reference to changing the identification number assigned to Wiedersun Associates over to the name of National Homes.

Q Who assigned that number?

A The Navy assigned it when they sent us the plans we requested, the plans they gave us had an identification number.

Q Why was it necessary to change the number?

A The Naval procedure, in other words, when the final plans are submitted to the Navy and there is no indication of who prepared the plans and who is submitting the proposal. The plans are all numbered with an identification number. In this case 0-129. And then the proposal submitted. In this case by National Homes and was supposedly in the enclosed package with the identification number. They do not know who is submitting the proposal.

Q In other words, the number had to be the person submitting the bid for the architect?

A Yes.

MR. MORRISON: I offer this in evidence as plaintiff's Exhibit 15.

MR. SIMMONS: No objection.

THE CLERK: Document marked for identification as plaintiff's Exhibit 15, now received in evidence.

(Marked).

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q I note that there is some handwriting up at the top of that letter, is that your handwriting?

A Yes, it is.

Q What does that handwriting reflect?

A I sent a copy on 4-2 the same day I sent the letter to the Navy to Mr. Gleason's attention.

Q You sent a copy of this letter to Mr. Gleason?

A Yes.

Q Now, the drawings that you have identified as having been submitted to you and sent to National on March 30, were those drawings ever changed in any way?

A As I mentioned in the memo, they were being gone through for slight modifications of the title, maybe a word or two, I don't know exactly.

Q When did those changes take place?

A After the 30th.

Q After the 30th. Did there come a time when you received a second set of drawings?

A Yes, Sir.

Q When was that?

A That would be on the 4th.

MR. MORRISON: I would like this marked as plaintiff's Exhibit 16 for identification, the drawings.

THE CLERK: A group of drawings marked for identification as plaintiff's Exhibit 16.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, I show you plaintiff's Exhibit 16 for identification, and ask if you can identify these drawings?

A Yes. These are the revised drawings that were marked on different revision dates as such revised April 4, '73, revised 2 April, '73.

Q First of all, how many pages of these drawings are there?

A From drawing SK00 to drawings SK20.

Q Now, you refer to revised, does that appear on the drawings?

A Yes, on the drawings that were changed. It is standard practice that they put revision dates above the original dates.

Q So March 29th date still shows, but there is a revision date?

A March 30th, '73, revision, or revised written above, revised April 3, '73.

Q Would you look through and tell us how many pages show that they were revised?

A There are nine revision dates.

Q Nine pages show revisions?

A Yes, Sir.

MR. MORRISON: I offer this in evidence

as plaintiff's Exhibit 16.

MR. SIMMONS: May I inspect them again.

MR. MORRISON: Surely.

MR. SIMMONS: Well, Your Honor, may we have a side bar?

THE COURT: Yes.

(Thereupon, counsel and the reporter approached the Bench and conferred with the Court, as follows:)

MR. SIMMONS: Your Honor, I am going to object to the introduction of these plans in evidence because these plans have not been produced and were not produced in response --

THE COURT: They were--

MR. SIMMONS: Not produced in response to the discovery request. Different plans were identified as having been sent in the deposition testimony by Mr. Duley. These plans were not produced for us, and I object.

MR. MORRISON: Those are the plans you have. You have a copy of those that very same things.

MR. SIMMONS: Not with the revisions on them.

MR. MORRISON: Yes, you do. That will be

the testimony that he sent those to you.

MR. SIMMONS: Here are all of the documents on the deposition marked as Exhibit H and Mr. Duley identified as having been sent.

MR. MORRISON: Mr. Duley?

MR. SIMMONS: Excuse me, Mr. Laverty identified as having been sent with his revised plans of what was sent to National. And there are no revision dates.

THE COURT: Well, maybe it doesn't show up.

MR. SIMMONS: Well, we can take a look. If you will look at the first, there are no revisions marked on the copies produced for us. And there appears revisions marked on the copies that are being offered.

MR. MORRISON: They are the same drawings.

MR. SIMMONS: Well, I don't know that.

MR. MORRISON: Well, you can look at it. You have guys who are expert, and this just goes to the weight.

THE COURT: The objection is overruled.

(Thereupon counsel returned to counsel's table and the trial proceeded, as follows:).

THE CLERK: A revised group of drawings marked for identification as plaintiff's Exhibit 16, now received in evidence.

(Marked).

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, I direct your attention to these drawings, was the process the same on these drawings as before; namely that you had to trace and then reproduce them and these would be the reproduced versions?

A Yes.

Q How many reproductions did you get the second time?

A The second time we got twelve sets of plans, complete plans made up. Four for our office, and eight sets for National.

Q And did you forward eight sets to National?

A Yes, I did.

Q Did you personally do that?

A Yes, I did.

Q Who did you send them to?

A I sent them to Mr. Payne's attention. I did -- I followed the same procedure as I did previously. Put them on an airplane the same flight and called up

Mr. Payne's office to confirm the fact that they were on their way.

Q Did you send a letter to Mr. Payne?

A Yes, I did, Sir.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 17 for identification.

THE CLERK: A letter dated April 4, 1973, with the receipt attached thereto, marked for identification as plaintiff's Exhibit 17.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q I show you plaintiff's Exhibit 17 for identification. Can you identify this?

A Yes, Sir.

Q What is it?

A This is a copy of my letter to Mr. Payne which accompanied the drawings.

Q The revised drawings?

A Yes, Sir.

Q And, what is the attachment to the letter?

A The attachment is again the airline receipt for flight 463 that I received from the airplane upon delivery of the package.

MR. MORRISON: I offer this document in

evidence as plaintiff's Exhibit 17.

MR. SIMMONS: No objection.

THE CLERK: Document offered for identification as plaintiff's Exhibit 17, now received in evidence.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, first of all, would you read the contents of your letter to Mr. Payne?

A Certainly. " Reference: Navy Housing Project at the Navy Weapons Station, Charleston, South Carolina. Dear Floyd: Enclosed are the eight (8) sets of completed Architectural-Engineering Drawings required for submission of our project proposal for the 200 Family Housing Project in Charleston, South Carolina. Thank you for your cooperation and good luck with your proposal. Very truly yours, William G. Laverty."

Q Directing your attention to the receipt which is now the second page, there is some handwriting at the bottom of that page, can you identify that?

A Yes, that is my signature.

Q Would you read that to the jury, please?

A I wrote a note on the copy: " Called Floyd's office to confirm plans on their way. National will be

there to pick up the plans, on the 6th will fly plan proposal to South Carolina."

Q When did you make that notation?

A When I got back to the office.

Q On that date?

A On the same date, Sir.

Q Subsequent to April 5, did you have any further conversations with anyone at National? I am sorry, between April 5, and say the end of April, 1973, did you have any further conversation with anyone at National regarding this project?

A No, just the confirmation that the plans were on their way.

Q Was that the last contact that you had?

A Yes, Sir.

Q Now, when did you first discover that the bid had not been submitted?

A Approximately ninety days or so after the proposal was supposedly submitted, which is the normal time for such a project. I called South Carolina, Southern Division office to find out the results of the proposal. If they had been awarded to a contractor. Upon calling and asking what were the results, I was informed that there was an award and that National had

never submitted the proposal.

Q Was that the first time you learned that it was not submitted?

A Yes.

Q What did you do after you had that telephone conversation?

A I immediately talked to Mr. Wiedersun.

Q Which one?

A Fred.

Q What did you discuss?

A The results of my telephone conversation with the Southern Division, and the fact that we just didn't understand what had happened that there was no submission, and nothing about it. We knew nothing about it. The direction to me was to try to find out exactly what did happen.

Q Did you subsequently have a conversation with National?

A Yes, I did.

Q Whom did you talk to?

A Mr. Payne.

Q When did you speak to him?

A When did I speak to him?

Q Yes?

A After my conversation with Mr. Wiedersun.

Q What was said between you and Mr. Payne?

A Well, I asked what happened. I told him that I called the Southern Division to find out that there was no submission from National, and I asked what happened. I said Mr. Wiedersun was very upset about the fact that we went through all of our obligations and to find out that the proposal was not submitted. And he informed me that he thought Mr. Gleason had informed our office of the decision. And they just decided not to submit a proposal.

Q Did he give you any reason as to why?

A To my knowledge, no.

Q Did you have occasion to make a memoranda regarding these events?

A Yes, I did.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 18 for identification.

THE CLERK: One page document, re, Navy Housing Project, Charleston, South Carolina, marked for identification as plaintiff's Exhibit 18.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, I show you plaintiff's Exhibit

18 for identification, and ask you if you can identify this document?

A Yes, Sir.

Q What is it?

A It is a memoranda I wrote as per my conversation with the Southern Division office, and at the bottom of the memoranda is my response to Mr. Wiedersun. You want me to read it?

Q No. Is this your signature on the memoranda?

A Yes, it is.

Q When did you prepare that memorandum?

A After my conversation.

Q With the Navy?

A Yes.

Q And the handwriting note at the bottom, was that made at the same time or later?

A It was made after my conversation with Mr. Payne.

MR. MORRISON: I offer this in evidence as plaintiff's Exhibit 18.

MR. SIMMONS: No objection.

THE CLERK: Document marked for identification as plaintiff's Exhibit 18, now received in evidence.

(Marked).

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Mr. Laverty, would you, please, read to the jury the text of the memoranda as well as your handwritten note at the bottom?

A Yes. " On July 24, I called the Southern Divisions office in South Carolina to see if the housing project was awarded yet since the normal ninety day period was up July 6th. I spoke with Mrs. Whitford, whom I spoke with in April. She asked for our group name and I said, National Homes, since they were submitting the proposal. Mrs. Whitford stated there was no bid from National Homes or Wiedersum. (I asked if it was under Wiedersum.) She said she would doublecheck but found nothing.

I tried to explain to her that we thought our proposal was in their office. She suggested we contact our contractor to find out what happened.

As far as I know, National never informed us of their decision not to submit our proposal. I will call Mr. Gleason or Mr. Payne shortly but would like to discuss this matter first with the front office." and it is signed, " William G. Laverty."

Q Would you read the notation at the bottom?

A Yes. " To FGW: As per our conversation, I called Floyd Payne to find out what happened and why we were not informed. He said they just decided not to submit a price, but he thought that John Gleason notified us. I said that nobody from N.H. contacted our office and that you were upset, because we went to all the expense of pushing the job out and then National Home decides not to put in our proposal." and I initialled it "WGL."

Q Did you ever have occasion to investigate who the winning bidder was and what the amount of that bid was?

A Yes, I did, Sir.

Q When was that?

A Mr. Wiedersum requested that I look into it more and get how many bids were sent in and what were the awards and what was the award amount.

Q Did you make a memoranda of that?

A Yes, I did, Sir.

MR. MORRISON: I would like to have this marked as plaintiff's Exhibit 19 for identification.

THE CLERK: Memoranda dated September 12, 1973, marked for identification as plaintiff's Exhibit 19.

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q I show you plaintiff's Exhibit 19 for identification, can you identify this document?

A Yes, Sir, I can.

Q And what is it?

A It is my memoranda to Frederic G. Wiedersum with reference to the final bid on the project.

Q I beg your pardon?

A Along with the final award amount.

MR. MORRISON: I offer this in evidence as plaintiff's Exhibit 19.

MR. SIMMONS: No objection.

THE CLERK: Document marked for identification as plaintiff's Exhibit 19 received in evidence.

(Marked).

DIRECT EXAMINATION CONTINUES

BY MR. MORRISON:

Q Would you read the text of the memorandum to the jury?

A Yes. " Memoranda to Frederic G. Wiedersum. Reference: 200 Family Housing Project at the Naval Weapons Station Charleston, South Carolina.

You requested some time ago the number of final bidders on the above project. I called Mrs.

Whitford of the Southern Division's Contract Office. She is the lady who enlightened us to the fact that National Homes did not submit our joint proposal. I also spoke to her in early April. When I called, she remembered me and was most helpful. The following information was given to me:

A. There were six (6) final proposers.

B. The above project was awarded to Lake-McDonald of Georgia.

C. Jewell Builders are doing the previous housing project on an adjoining site.

D. The final negotiated cost as awarded was $4,262,640.00.

This amount is $358,640.00 above the funds allocated for the above project. (Specs stated that $3,904,000.00 was the available)." and it is signed "William G. Laverty".

Q Mr. Laverty, you testified that you were involved in both the Warminister on the South Carolina project with National, is that correct?

A Yes.

Q Did you have many conversations with the people at National during this time?

A When?

Q Between yourselves and the people at National?

A Between the Warminister and the Charleston job?

Q With respect to either project, did you have conversations with them?

A Yes.

Q Did you have numerous conversations?

A Not numerous, no.

Q But you had conversations on both projects?

A Yes.

Q Now, you heard Mr. Simmons tell the jury that it is National's contention that an agreement to submit a bid would never be made until after the final drawing had been completed by Wiedersum?

A No.

Q Did anybody ever tell you that?

A No.

Q Did Mr. Payne ever say that?

A No.

Q Did Mr. Duley?

A No.

Q Did Mr. Gleason ever say that?

A No, Sir.

MR. MORRISON: I have no further questions.

CROSS EXAMINATION

BY MR. SIMMONS:

Q Now, Mr. Laverty, you just testified that you were not told by anyone from National Homes that the bid was not being submitted?

A That's correct.

Q How many conversations during April of '73 did you have with people from National?

A During April of '73?

Q During April of '73, yes.

A I would say at least four.

Q And with whom did you have conversations? Who were these people?

A Mr. Duley and Mr. Payne.

Q And were these the only people you spoke with?

A To the best of my recollection.

Q Now, you also said that no one from National informed you that the decision would not be made prior to the final plans coming in?

A That is right.

Q Do you recall ever mentioning to anyone that Wiedersum would not have started the drawings,

draft plans, unless National promised a bid would go in? Did you say that to anyone?

A Did I say that to anyone?

Q Yes.

A Would you repeat the question.

Q Did you tell anyone from National that Wiedersun would not start working on the South Carolina project unless there were commitments to put in a proposal?

A No, I don't have the authority.

Q Do you recall anyone else from Wiedersun saying that to National?

A No, I don't, sir.

Q Now, Mr. Laverty, what that the Navy refers to as "bid document"?

A Bid document?

Q Yes.

A I don't know what the Navy refers to as bid document, but I know what I refer to.

Q And what is it that you refer to as bid document?

A Bid documents would be the plans, specifications, any attached form addendum that we may set up for a project.

Q Now, I show you Plaintiff's Exhibit 17 in Evidence, and ask you again to read how you describe the

plans there?

A "Enclosed are eight (8) sets of complete architectural-engineering drawings --"

Q Architectural-engineering drawings?

A Yes, sir.

Q Now, you contend, do you not, Mr. Laverty, that you sent plans with the March 30th letter?

A Yes, sir.

MR. MORRISON: I object to theuse of the word "contend." He testified --

THE COURT: I sustain the objection as to the form.

CROSS-EXAMINATION CONTINUED

BY MR. SIMMONS:

Q Now, you testified, Mr. Laverty, that you sent plans with the March 30th letter. Read how you identified the enclosure there.

A "Enclosed are the bid documents for the Navy Housing Project, Charleston, South Carolina."

Q You don't refer to architectural-engineering drawings, do you?

A It wasn't only architectural drawings, these were the drawings plus the Government forms. It is more than one.

Q There is no reference to plans, is there, Mr. Laverty?

A In that memo, no.

Q Now, Mr. Laverty, isn't it a fact that you are not sure of what it is that you sent on March 30th?

A No, there is no doubt in my mindwhat I sent.

Q Well, how was this package prepared? Who prepared it? I think you mentioned,packing room wrapping it?

A Yes.

Q Where is that room located physically in relation to your office?

A It is around the corridor, sir.

Q What would be the procedure followed here? You would prepare a letter, is that right, sir?

A Yes, sir.

Q And then what happened?

A Well, we got the documents back from the blue printer, they were in the blue printer's room, and they would be wrapped up with the form, the Government forms which were stuck in and they were wrapped in brown paper.

Q And who physically took the package to the packing room?

A Who physically took the package?

Q Yes, who physically took it to the package room?

A The plans come into the package room, sir.

Q I think you said that the package went out?

A Yes, sir.

Q Was it wrapped up?

A Yes, sir.

Q In the package room did you see who wrapped it up?

A Yes, sir.

Q Well, who took it from your office to the package room?

A The plans are delivered -- when I say package room, that is our blue print room, where the plans come to our blue print room. They are delivered to that room. And when they came in, I was there and I took the Government forms and the fellow just wrapped them up for me and I put my label on and off I went.

Q You remember this. You remember seeing the plans?

A Yes, sir. I remember the package.

Q Now, Mr. Laverty, do you recall attending a deposition on the 16th of September, last year?

A Yes, sir.

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Q And do you recall me asking you this question: "Mr. Laverty, the letter --" referring to Exhibit 12 in Evidence, "the March 30th letter, the letter refers to the fact that bid documents for the South Carolina Project are enclosed. What are bid documents?"

And your answer was: "I would assume at this point that they are sets of necessary plans that would be needed for National to start their pricing."

Now, a moment ago you testified that the plans were something separate and apart; is that not right?

A I beg your pardon?

Q You said a moment ago, you testified that the plans were something separate and apart from bid documents, is that not right?

A I said a moment ago plans or the bid documents, along with other forms. I said on the 4th the plans I sent were on the plans.

Q Do you recall being asked this question, Mr. Laverty?

"Question: I previously asked you, in connection with Exhibit P, the March 30th letter to Mr. Duley, that mentioned in the bid document, I asked you about plans. Does this help you to refresh your recollection as to what was sent and when?

"Answer: Exactly, no. I would assume that we sent at that time a set of plans for them to start pricing.

"Question: You assumed that you sent Mr. Duley, as part of the enclosure of bid documents, a set of plans?

"Answer: Yes. I said bid documents. I don't know exactly what I sent, you know, different terminology."

Do you remember giving that answer?

A Not exactly, sir.

Q You don't recall giving that answer?

A Well, that was some time ago, sir. I would say I gave the answer, if you read it from the deposition.

THE COURT: Could I have the original of the transcript.

Q Now, you said that was some time ago?

A Yes.

Q Do you recall your deposition being presented to you for signature?

A Yes, sir.

Q And did you swear to the accuracy of what you stated there under oath?

A Yes, sir.

Q And would you read the date that you affirmed to the accuracy of what you stated?

A 8 October 1975.

Q A couple of months ago?

A Yes, sir.

Q Did you make any changes on pages 68 and 69?

A Of the deposition, sir?

Q Yes.

A Did I make any changes?

Q Yes.

A I don't believe so.

Q Did you read it?

A Oh, yes, sir. I don't remember the exact words I read, from the context.

Q Why don't you turn to 68 and 69 and read it.

MR. MORRISON: I will stipulate that the transcript is an accurate transcript of what was said. If Mr. Simmons wants him to read it, that is fine with me.

THE WITNESS: That is what I stated.

MR. MORRISON: I don't contend that the reporter erroneously transcribed the deposition.

MR. SIMMONS: I appreciate Mr. Morrison's stipulation, but I would like to continue with my

cross-examination, if I may.

THE WITNESS: Read from where?

BY MR. SIMMONS:

Q Starting at the bottom of the page.

A "Question: --"

Q No, you don't have to read it again. Did you read it before you signed it?

A Yes, sir.

Q Did you make any changes?

A No, sir.

Q So there is no doubt in your mind that this was your testimony, and you made that testimony under oath, did you not?

A Yes, sir.

Q Well, Mr. Laverty, if in October of '75 you were not sure of what it was that you sent, what is it that makes you so sure today? What have you looked at since then?

A What have I looked at since then?

Q What is it that makes you so sure today that you did send plans?

A Because I know I sent it. I said that in the deposition that I sent the plans.

Q "Question: You assume that you sent Mr. Duley, as part of the enclosure of bid documents, a set of plans?

"Answer: Yes. I said bid document. I don't know exactly what I sent. You know, different terminology."

What is it that makes you so sure today, Mr. Laverty?

A When I signed that deposition, that deposition was not taken in October when I signed it. I had never been before a deposition before. I thought I was signing to what I stated there.

Q Well, at the time you were deposed, Mr. Laverty, you had seen the bid documents or the contract documents inserted in the set of final plans and rolled up, you had seen that?

A Yes, sir.

Q But your testimony after that was: "I don't know exactly what I sent."

A I don't know exactly how many plans I sent. That is what I meant, sir.

Q What you meant was that you don't know how many plans you sent?

A Yes, sir.

Q Now, Mr. Laverty, what was your function with respect to the South Carolina Project?

A What was my function?

Q Yes, what did you do?

A I initiated the project.

Q You initiated the project?

A Yes.

Q You had conversations with people at National?

A Yes, sir.

Q You sent out documents?

A Yes, sir.

Q You wrote letters?

A Yes, sir.

Q Would it be fair to say you were the day-to-day contact with National?

A No, it wouldn't.

Q Who was the day-to-day contact?

A I believe Mr. Voorneveld of our office.

Q Mr. Laverty, what was Mr. Duley's involvement with the South Carolina Project as far as you know?

A As far as I know, just that I sent him those plans and those Government forms.

Q Well, had you had any conversations with Mr. Duley concerning this project prior to March?

A Prior to March?

Q Yes.

A No, sir.

Q All of your conversations then had been with other people?

A Yes, sir.

Q Now, you had had some contact, had you not, with Mr. Duley in connection with the Warminister Project?

A Yes, I did, sir.

Q What was it, Mr. Laverty, that caused you to direct your letter of March 30th to Mr. Duley, the letter referring to bid documents?

A I do not -- well, let's put it this way: It was requested that Mr. Duley read these forms.

Q It was requested by whom?

A I don't recall, sir.

Q Well, what is it that you do recall? You said it was requested?

A That was requested.

Q Well, requested what?

A That Mr. Duley needed these forms to be filled out. And I followed them with the plans to Mr. Duley's attention. I called him up in the morning and I informed him that the plans were going to go out that day. And I then called him after the plans went out.

Q What were you informed that Mr. Duley needed?

A The forms, the Government forms and the

identification that the Navy sent to us.

Q You don't recall who told you that?

A Offhand, I don't, sir.

Q It wasn't Mr. Duley?

A I don't recall, sir. I don't recall, if he called. I wouldn't have called him, though.

Q But you do recall being told by someone that Mr. Duley needed the documents that had to be filled out as far as the bid part of the proposal?

A Yes, the forms.

Q You do recall that?

A Yes, and I put that with the plans and I called Mr. Duley.

Q You said you do recall that?

A Yes, sir.

Q Why did you send the plans to Mr. Duley?

A They were going out and I sent them to his attention. I don't know.

Q Who asked you for the plans?

A Mr. Gleason.

Q Mr. Gleason had asked you for the plans?

A In a previous discussion in conversation with Mr. Gleason. And I called Mr. Duley and informed --

Q Let's take them one at a time. You said

Mr. Gleason had asked you for the plans?

A Yes.

Q And Mr. Payne also had asked for the plans?

A Did I say Mr. Gleason?

Q You said Mr. Gleason.

A I'm sorry, Mr. Payne. I'm sorry.

Q Now, what did Mr. Payne say to you?

A This was in some previous conversation, earlier conversation with regard to what what he needed for the final proposal.

Q What did he say?

A That he needed the plans six days prior to submission.

Q He said more than that. Didn't he say that was the minimum?

A He could have.

Q Didn't you have a number of conversations in which he said he needed the final plans and to please get them to him?

A I don't recall any specific conversation.

Q You don't recall any specific conversation, but you do recall a number?

A There were a couple.

Q He was pressing you, wasn't he?

A Well, I guess you could say that.

Q O.K. All right. And what was Mr. Payne's function on this job, on the South Carolina Project?

A I don't know.

Q You have no idea what it was that Mr. Payne was doing?

A No, sir, but that he worked under Mr. Gleason.

Q Did he tell you why he needed the plans, that is, Mr. Payne?

A I assume to put a price on it, sir.

(Continued on next page.)

Q Don't you know as a fact whether or not Mr. Payne was involved with pricing?

A I don't know what Mr. Payne's function was exactly at National Homes. I only met him once.

Q Well, if Mr. Payne was pressing you, why didn't you mention it in your letter to Mr. Duley to send these plans immediately to Mr. Payne?

A Because I might have done it in a phone conversation, I do not recall, sir.

Q You might have?

A I might have in a phone conversation.

Q With whom?

A Mr. Duley, so I put the plans on the plane.

Q Do you remember the phone conversation with Mr. Duley afterward?

A I don't remember.

Q You had a phone conversation with him before, is that right?

A I said I had a phone conversation with him before?

Q You did.

A Before I sent the plans on the plane.

Q Before you sent the plans, before you wrote your letter, do you recall having any conversation with

Mr. Duley? I think you said you did not.

A That would be the morning before I sent the plans and probably before I sent the plans I wrote the document there, the letter, the transmittal letter.

Q Let me make sure I understand your testimony, Mr. Laverty. I think you said you were not sure how you were told to send these contract documents to Mr. Duley, is that right?

A How I was told?

Q Yes. I think you said you do not recall who told you?

A I said how I was told, is that what the question was?

Q Who told you, who told you to send them to Mr. Duley?

A I don't recall who told me in the office.

Q I asked whether you recall speaking to Mr. Duley, whether Mr. Duley told you to send them to him, and you said you did not recall.

A You are asking me if I spoke to Mr. Duley?

Q Yes.

A Mr. Duley didn't tell me to send them to him.

Q You are sure you didn't speak to Mr. Duley?

A I am most positive.

Q Now, what time of day were your plans completed on the 30th?

A The plans were returned to our office by the blue printer in the morning.

Q What time?

A I think we got them back around 11 or 10:30, or 11. I am not sure. We usually get them back early.

Q I am not talking about what the general rule is, I am talking about this case of March 30th.

A It was sometime mid-morning.

Q What do you mean by mid-morning?

MR. MORRISON: Objection. He just answered that.

MR. SIMMONS: I think I am entitled to know, your Honor, what is his best recollection.

THE COURT: What is your best recollection?

THE WITNESS: I would say 10:30.

BY MR. SIMMONS:

Q About 10:30?

A Yes, sir.

Q Now, how long does it take to reproduce, to make a copy of a set of drawings?

A To make a copy of the original tracings?

Q Yes.

A It is hard to say. We don't have the machine in our office, I don't know what the time would be.

Q In other words, if I brought you a set of plans, a set of original drawings, you don't know how long it would take to make a copy of them?

A We could run off a copy of this in a matter of minutes, you know, one set of plans directly in the machine and out again.

Q In your office?

A In our office.

Q It takes about a minute or so to make those copies?

A To make all of these copies?

Q Yes.

A In our office in a machine it would take maybe less than a minute to make one print in our office, but we didn't do them in our office.

Q Where was it done?

A A professional printer who does blue prints.

Q And where is that professional printer located?

A In Rockville Centre.

Q And where is your office?

A In Valley Stream, New York.

Q And how far away is Rockville Centre?

A About four miles, maybe between three and four miles.

Q So what time were these plans, as best you can recall, delivered to the printer, to the reproducer?

A I would say the plans were probably delivered the previous night. They were all gathered into our office before the closing date.

Q I thought you said that you completed the drafting of the plans on the morning of the 30th?

A Yes, they were dated the morning of the 30th, the completion date which we were reaching for.

Q Well, I am completely confused. What is it that happened mid-morning on the 30th?

A What happened?

Q I asked you when the drafting was completed.

A Yes, sir.

Q And I thought you said at mid-morning on the 30th?

A No, you asked me when the blue prints were completed. The blue prints are these, sir, the drafting is done on the original tracing.

Q I see. Well, now, this was the blue printing that was done outside, and it was delivered to the printer the night before, is that correct?

A It could have been delivered in the morning, sir.

Q You don't know?

A I didn't go around checking the drawings in the office. All of our people knew that they had to be done and completed. It could have been Mr. Wiedersun. I don't recall taking these drawings physically from everybody.

Q The only thing you recall is taking them to the package area, is that correct?

A Yes, because I was going there personally.

Q You stated a little earlier that the time this project first came to your attention, do you recall some conversations with Mr. Payne about the proposed conference and who would not attend?

A Yes, sir.

Q Now, what was said during those conversations?

A The essence was originally we were going to attend the conference. Then it was decided -- we talked to Mr. Payne and who said it was not necessary for our people to attend.

Q Did Mr. Payne not tell you though that it was customary?

A He might have said that.

Q He might have said that?

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